

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 570

McELROY, SECRETARY OF DEFENSE, ET AL.,
PETITIONERS,

vs.

UNITED STATES, EX REL. DOMINIC GUAGLIARDO.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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Original Print

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of Columbia.

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(File endorsement omitted)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Habeas Corpus No. 123-57

UNITED STATES OF AMERICA EX REL DOMINIC GUAGLIARDO,
Base Stockade, Nouasseur Air Depot, Morocco,
Petitioner,

v.

NEIL H. McELROY, SECRETARY OF DEFENSE, Department of
Defense, Washington, D. C.

JAMES H. DOUGLAS, SECRETARY OF THE AIR FORCE,
Department of Defense, Washington, D. C.

GEN. THOMAS D. WHITE, CHIEF OF STAFF, UNITED STATES
AIR FORCE, Department of Defense, Washington, D. C.
Respondents.

Petition for Writ of Habeas Corpus—Filed December 2, 1957

The petition of Dominic Guagliardo respectfully shows:

1. That the petitioner, Dominic Guagliardo, is a citizen of the United States. That, at all times relevant hereto, he was a civilian employed by the United States Air Force at the Nouasseur Air Depot, near Casablanca, Morocco. That he is not a member of the Armed Forces of the United States.

2. That petitioner is currently held, pursuant to Military Orders and by direction of military authorities, in the territorial limits of Morocco and within the jurisdiction of the 17th United States Air Force.

2 3. That heretofore, purporting to act under the authority of Article 2 (11) of the Uniform Code of Military Justice (50 U.S.C. § 522 (11)), the United States Air Force caused petitioner to be tried by a general court martial of the United States Air Force convened at Nouasseur Air Depot, Morocco, on charges of larceny and

conspiracy in violation of Articles 121 and 81 of the Uniform Code of Military Justice (50 U.S.C. §§ 715 and 675).

4. That petitioner was so tried and on or about September 3, 1957, was sentenced to three (3) years at hard labor and a fine of \$1,000.00.

5. That since on or about September 3, 1957, petitioner has been and is now detained and confined at the Base Stockade, Nouasseur Air Depot, Morocco.

6. That petitioner's detention and confinement is illegal and in violation of the Constitution of the United States, to wit, Article III, Section 2, and the Sixth Amendment, which guarantee to petitioner, a civilian, the right to trial by jury after indictment by a grand jury, said guarantees having been most recently reiterated in *Reid v. Covert*, U.S. 1 L. Ed. 2d 1148 (1957).

7. That the persons exercising physical custody and restraint of petitioner are subordinate to and under the direction of respondents.

8. That the respondents herein are the highest ranking officials of the military establishment of the United States and the United States Air Force and by law and custom of the military service, have jurisdiction over and are empowered to issue orders to subordinates in command, including the military personnel who hold petitioner in confinement at the Nouasseur Air Depot, near Casablanca, Morocco.

9. No previous application has been made for the relief herein sought to any court or judge.

WHEREFORE, petitioner prays that a writ of habeas corpus be granted and issued, directed to respondents, commanding them to produce the body of petitioner before this Court at a time and place therein to be specified, then and there to receive and do what this Court shall order concerning the detention and restraint of petitioner, and that petitioner be ordered discharged from the detention and restraint aforesaid; and for such

other and further relief as to the Court seems just and proper.

JACK BOHANA
Jack Bohana,
On Behalf of
DOMINIC GUAGLIARDO, *Petitioner.*

MICHAEL A. SCHUCHAT
Michael A. Schuchat,
231 Tower Building,
Washington, D. C.

Attorney for Petitioner.

GEIGER, HARMEL AND SCHUCHAT,

Of Counsel.

4 — STATE OF NEW YORK } ss:
COUNTY OF NEW YORK }

Jack Bohana, being duly sworn, deposes and says:

That he is an attorney admitted to practice before the Court of Appeals of the State of New York; that he is engaged in the practice of law in Casablanca, Morocco; that he is the attorney for petitioner in the court martial proceedings described in the petition; that he has read the foregoing petition and has signed it at the request of and on behalf of petitioner; that he knows the contents of the petition and that, upon information and belief, all matters contained therein are true.

JACK BOHANA
Jack Bohana

Sworn to before me this 21 day of November, 1957.

REUBEN K. SMITH
Notary Public

Reuben K. Smith
Notary Public, State of New York
No. 31-3742500
Qualified in New York County
Commission Expires March 30, 1959

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(File endorsement omitted)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

H. C. No. 123-57

UNITED STATES OF AMERICA EX REL DOMINIC GUAGLIARDO,
Petitioner,

v.

NEIL H. McELROY, ET AL, *Respondents.*

Order Directing Respondents to Show Cause—December 2, 1957

Upon consideration of the verified petition of Dominic Guagliardo for a writ of habeas corpus filed herein, and good cause appearing therefor, it is this 2nd day of December, 1957,

ORDERED, That the respondents be and they are hereby ordered and directed to appear before the Judge of said Court sitting in Motions Court on the 17th day of December, 1957, at 10 o'clock A.M. of said day, to show cause, if any they have, why a writ of habeas corpus should not be issued and the relief granted as prayed for in the aforesaid petition; PROVIDED, that a copy of this rule and of said petition be promptly served upon the respondents herein.

JOHN J. SIRICA

United States District Judge

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(File endorsement omitted)

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

H. C. No. 123-57

DOMINIC GU'AGLIARDO, *Petitioner*

v.

NEIL H. McELROY, ET AL, *Respondents*

**Excerpt From Return and Answer to Rule to
Show Cause—Filed December 12, 1957**

Come now the respondents, Neil H. McElroy, Secretary of Defense, James H. Douglas, Secretary of Air Force and General Thomas D. White, Chief of Staff, United States Air Force, by their attorney, the United States Attorney in and for the District of Columbia, and as a return and answer to the rule to show cause respectfully represent to the Court as follows:

1. The petitioner, a civilian employee of the Department of the Air Force, hired on March 31, 1954, at Nouasseur Depot, Morocco, was tried and convicted on August 28-29 and September 3-4, 1957 by a General Court Martial convened by the Commander, Southern Materiel Area, Europe, on charges of having violated the Uniform Code of Military Justice Article 121, 10 U.S.C. 921, with one specification thereunder alleging that he did with two named airmen steal property of the United States of a value of about \$4690.00 and of having violated the Uniform Code of Military Justice Article 81, 10 U.S.C. 881, with one specification thereunder alleging that he did conspire with two named airmen to commit the crime of larceny. The petitioner was sentenced by the Court Martial to be fined \$1,000 and to be confined at hard labor for 3 years. He is presently in confinement in the Base Stockade, Nouasseur Air Depot, Morocco, in the custody of the Commander, 3153rd Air Base Wing, Nouasseur Air Base, Morocco.

Initial review action on the record of trial pursuant to Articles 61 and 64 of the Uniform Code of Military Justice, 10 U.S.C. 861 and 864 was completed on December 10, 1957, resulting in the disapproval of findings

of guilty as to Charge I and its specification (larceny), due solely to an instructional deficiency and not due to failure of proof. The sentence was approved. This review action was taken by the Commander, Southern Air Materiel Area, Europe.

* * * * *

21 WHEREFORE, the premises considered, the respondents respectfully request the Court to dismiss the petition for habeas corpus and discharge the rule to show cause.

OLIVER GASCH
Oliver Gasch
United States Attorney

EDWARD P. TROXELL
Edward P. Troxell, *Principal*
Asst. United States Attorney

JOHN W. KERN III
John W. Kern III
Asst. United States Attorney

Certificate of Service

I hereby certify that a copy of the foregoing Return and Answer has been delivered by hand to Messrs. Geiger, Harmel and Schuchat, Tower Building, Washington, D. C., attorneys for the plaintiff, this 12th day of December, 1957.

JOHN W. KERN III
John W. Kern, III
Asst. United States Attorney

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Habeas Corpus No. 123-57

DOMINIC GUAGLIARDO, *Petitioner*

v.

NEIL H. McELROY, ET AL, *Respondents*

Affidavit

DISTRICT OF COLUMBIA: SS

I William M. Burch II, being first sworn upon oath depose and say:

I am a Major in the office of the Judge Advocate General, United States Air Force, and as such I have access to the records of the Department of the Air Force pertaining to the General Court Martial case of United States vs. Dominic Guagliardo, the petitioner herein.

I certify that the following information concerning the general court-martial case of Dominic Guagliardo is contained in official records of the Department of the Air Force and is true to the best of my knowledge and belief:

Guagliardo was hired by the Department of the Air Force on 31 March 1954 at Nouasseur Air Depot, Morocco, by the Civilian Personnel Office at that installation. His position title was that of an electrical lineman and his duties consisted of maintaining and repairing air field lighting, inspecting and repairing electrical conduits, transformers, lights, controls, ducts, and manholes. His Civil Service grade was that of a WB-15. On 31 March 1957 Guagliardo's temporary Civil Service appointment was converted to a career appointment pursuant to Civil Service Regulation 3.107. According to evidence adduced at the court-martial and as indicated in his petition for a writ of habeas corpus, Guagliardo remained in his status of a Dep't. of the Air Force Civilian employee throughout the entire proceedings. Additional information relating to the petitioner's employment status is contained in attached Exhibit A, being the affidavit of Captain Robert W. Von Werne.

On 18 July 1957, Guagliardo, together with two members of the United States Air Force, were charged with a violation of the Uniform Code of Military Justice, Article 121 (10 USC 921), with one specification thereunder alleging that the three accused, acting jointly and in pursuance of a common intent, did at Nouasseur Air Depot, Morocco, on or about 20 June 1957, steal leatherette goods and olive drab fabric material, of a total value of about \$4690.00 the property of the United States. In addition, the three accused were also charged with a violation of the Uniform Code of Military Justice, Article 81 (10 USC 881), with one specification thereunder alleging that they did conspire with each other to commit an offense under the Uniform Code of Military Justice, to wit: larceny.

On 14 August 1957, the charges against Guagliardo and his co-accused were referred to trial by a general court-martial appointed by paragraph 1, Special Order Number 144, dated 10 July 1957, as amended by paragraph 7, Special Order Number 161, dated 1 August 1957, as amended by paragraph 3, Special Order Number 140, dated 16 July 1957, all of the foregoing orders having been published by Headquarters, Southern Air Materiel Area, Europe (AMC), APO 30, New York, New York. (A photostatic copy of the charge sheet in this case is attached as Exhibit B.)

On 28-29 August 1957 and 3-4 September 1957, Guagliardo and his co-accused were tried by general court-martial convened at Nouasseur Air Depot, Morocco. Guagliardo pleaded not guilty to the charges and specifications and was found guilty, except that the value of the goods stolen was found to be "more than \$50.00" rather than "about \$4690.00".

24 Guagliardo was sentenced by the court to be fined \$1000.00 and to be confined at hard labor for three years.

Guagliardo is presently a prisoner at the Base Stockade at Nouasseur Air Base, Morocco. The person who has custody over the prisoner is the Commander, 3153rd Air Base Wing, Nouasseur Air Base, Morocco.

On December 10, 1957, the Commander Southern Air Materiel Area, Europe, disapproved the findings of guilty of charge I and its specification (larceny) because of an

instructional deficiency and approved the sentence as adjudged by the court.

Pursuant to the provisions of the Uniform Code of Military Justice (10 USC 801-940) the following appellate review process is applicable to this case. Prior to taking his action, the convening authority submitted the record for a written opinion to his staff judge advocate, who is a member of the bar of a Federal Court or of the highest court of a state and designated as competent to perform judge advocate duties by The Judge Advocate General. The opinion of a staff judge advocate includes a summary of all the evidence presented, an analysis of the legal problems involved, the application of the law to those problems, and an opinion as to whether the record was legally sufficient to support the finding of guilty and sentence in their entirety or in part. This review was made pursuant to Uniform Code of Military Justice, Article 61 (10 USC 861).

The staff judge advocate was also required to make a written report of those facts which should be considered by the officer exercising general court-martial jurisdiction, and other higher authorities charged with action on the case, in deciding whether clemency should be granted and the extent thereof. This report normally consists of the results of a personal interview with the accused; a history of his military service and available civilian background; and the recommendations of his chaplain, his squadron commander and others having a personal knowledge
 25 of his character, efficiency, and potential value to the Air Force.

After the officer exercising general court-martial jurisdiction received the opinion and recommendation of his staff judge advocate, he on the basis thereof and his independent consideration of the case, took the action he believed to be legal and appropriate pursuant to Uniform Code of Military Justice, Article 64 (10 USC 864). He had the power to approve only those findings of guilty and the sentence, or such part thereof, as he found correct in law and fact, and as he determined should be approved.

The record of trial will now be forwarded to the Office of The Judge Advocate General for review by a Board of Review in that office pursuant to Uniform Code of Military Justice, Article 65b (10 USC 865b).

The Board of Review is composed of three attorneys-at-law, who have been selected for the assignment on the basis of their training, experience, and ability in the field of law. Pursuant to Uniform Code of Military Justice, Article 66, (10 USC 866) the Board will determine not only whether the record is legally sufficient to support the findings and sentence, but whether the sentence is appropriate under all the circumstances. The Board will set aside all or such part of the findings and sentence as are not supported in law and fact.

If the Board affirms any part of the findings and sentence, the record will be forwarded to The Judge Advocate General, United States Air Force, for his independent consideration. If he concurs in the decision of the Board he will then determine whether the exercise of his clemency powers; with respect to the sentence is justified under the provisions of Uniform Code of Military Justice, Article 74 (10 USC 874). In making this determination, The Judge Advocate General considers the post-trial report of the military and civilian background of the accused made by the staff judge advocate to the officer exercising general court-martial jurisdiction; the seriousness of the offense; the circumstances surrounding the commission thereof, including aggravating as well as mitigating and extenuating circumstances; the sentence usually approved in cases of this nature; letters submitted in the accused's behalf; and other factors that may be pertinent.

If the Judge Advocate General concurs in the decision of the Board, a copy of that decision and his concurrence therein will be forwarded to the officer exercising general court-martial jurisdiction over the accused for service upon him. When the accused is served with the decision, he will be advised that he has thirty days within which to petition the United States Court of Military Appeals pursuant to the provisions of Uniform Code of Military Justice, Article 67 (10 USC 867) for a grant of review on any error of law he believes to exist in the case. The Court of Military Appeals consists of three judges appointed from civilian life by The President, with the advice and consent of the United States Senate.

If the Court of Military Appeals denies the accused's petition, the officer exercising general court-martial jurisdiction over the accused will be authorized to order into

execution such part of the sentence, as affirmed by the Board of Review and concurred in by The Judge Advocate General, as that officer considers necessary in the interests of justice and discipline. In addition to the foregoing appellate review available to the Petitioner in this case, pursuant to Article 73 of the Code (10 USC 873) Petitioner also has the right at any time within one year after approval by the Convening Authority of any sentence extending to confinement for one year or more to petition the Judge Advocate General for a new trial on the ground of newly discovered evidence or fraud on the court.

The records of the Department of the Air Force reflect that Petitioner, Guagliardo has not availed himself of all of the post-trial review procedures hereinbefore outlined and which are available to him in that only the initial review action by The Convening Authority has been completed in this case.

WILLIAM M. BURCH, II
William M. Burch, II

Subscribed and sworn before me this 12th day of December, 1957

MILDRED N. WALL
*Notary Public in and for
the District of Columbia*

My commission expires Aug. 15, 1962

28

(Filed Dec. 12, 1957)

EXHIBIT A

AFFIDAVIT

24 October 1957

I certify that the following information concerning Dominic Guagliardo, DAFC, to be true, to the best of my knowledge and belief:

(1) Date and place hired: 31 March 1954, at Nouasseur Air Depot, Morocco (Civilian Personnel Office).

(2) Wage Board Classification and duties performed: WB-15; Electrical Lineman (Maintains and repairs airfield

lighting, inspects and repairs electrical conducts, transformers, lights, controls, ducts and manholes).

(3) Date of Arrival in Morocco and type of transportation used: February 1954, by commercial ocean vessel.

(4) Type of passport and visa required: US Passport #16246, no visa required.

(5) Type and location of quarters: Quarters were not furnished on base. Accused's last address was: 29 Rue de Terves, Apt 35, Casablanca, Morocco.

(6) Accused was accompanied by wife on arrival in Morocco. Transportation was not at Government expense. However, accused's dependents departed Morocco for the Zone of Interior at government expense in September 1957.

(7) Privileges available to accused in Morocco were: Quarters allowance, commissary, USAFE Ration Card, Base Exchange, Officer's Club membership, medical and dental care at base hospital, authorization to use Military Payment Certificates and US Mail Privileges.

(8) Medical and Dental Treatment: Five (5) visits to base hospital in 1955 and 1956 for treatment of injured right hand; two (2) physical examinations in 1957. No record of dental treatment at this base.

(9) Photostatic copies of charge sheets are attached.

(10) Citizenship: Accused is US Citizen by birth; born at Tampa, Florida 6 July 1932.

ROBERT W. VON WERNE
Robert W. Von Werne
Captain, USAF
Commander, HEDRONSEC
3153rd Air Base Wing
APO 30, USAF

The above named officer, Captain Robert W. Von Werne, personally appeared before me and affixed his signature thereto.

JAMES W. WEBER
James W. Weber
1st Lt, USAF
Adjutant

CHARGE SHEET

PLACE Mossman Air Depot, Morocco		DATE 18 JUL 1957
ACCUSED (Last name, First name, Middle Initial) (List aliases when material.) GUMLIARDO, DOMINIC	SERVICE NUMBER ASO 8E292028 (Civ)	RANK OR GRADE RAF Civilian WD 15
ORGANIZATION AND ARMED FORCE (If the accused is not a member of any armed force, state other appropriate description showing that he is subject to military law.) Headquarters Squadron Section 3153rd Air Base Wing United States Air Force APO 30, USAF	DATE OF BIRTH 6 July 1932 CONTRIBUTION TO FAMILY OR QUARTERS ALLOWANCE (MCM, 126 b (2)) N/A	PAY PER MONTH BASIC \$ 506.88 SEA OR FOREIGN DUTY \$ None TOTAL \$ 506.88
RECORD OF SERVICE		
INITIAL DATE OF CURRENT SERVICE 31 Mar 54	TERM OF CURRENT SERVICE Indef	
PRIOR SERVICE (As to each prior period of service, give inclusive dates of service and organization in which serving at termination.) Military Service, USAF, from 5 Apr 51 to 21 Oct 53, Honorable Discharge. No prior Federal Civilian Service.		

CHARGE SHEET

PLACE Mossman Air Depot, Morocco		DATE 18 JUL 1957
ACCUSED (Last name, First name, Middle Initial) (List aliases when material.) HALL, Ralph C.	SERVICE NUMBER AF 25 989 260	GRADE Airman Basic
ORGANIZATION AND ARMED FORCE (If the accused is not a member of any armed force, state other appropriate description showing that he is subject to military law.) Headquarters Squadron Section 3153rd Air Base Wing United States Air Force APO 30, USAF	DATE OF BIRTH 8 Dec 36 CONTRIBUTION TO FAMILY OR QUARTERS ALLOWANCE (MCM, 126a (3)) None	PAY PER MONTH BASIC \$ 98.00 SEA OR FOREIGN DUTY \$ 8.00 TOTAL \$ 106.00
RECORD OF SERVICE		
INITIAL DATE OF CURRENT SERVICE 5 Nov 54	TERM OF CURRENT SERVICE 12 Nov 58	
PRIOR SERVICE (As to each prior period of service, give inclusive dates of service and organization in which serving at termination, if available.) None		

CHARGE SHEET

PLACE Mouassour Air Depot, Morocco	DATE 18 JUL 1957
ACCUSED (Last name, First name, Middle Initial) (List aliases when material.) Donaldson, Howard B. Jr.	SERVICE NUMBER AF 1-41 597
ORGANIZATION AND ARMED FORCE (If the accused is not a member of any armed force, state other appropriate description showing that he is subject to military law.) Headquarters Squadron 3153rd Air Base Wing United States Air Force APO 30, USAF	RANK OR GRADE Airman Second Class PAY PER MONTH BASIC \$ 132.60 SEA OR FOREIGN DUTY \$ 0.50 TOTAL \$ 133.10
DATE OF BIRTH 13 May 1935	CONTRIBUTION TO FAMILY OR QUARTERS ALLOWANCE (MCM, 136 & (2)) \$0.00

RECORD OF SERVICE

INITIAL DATE OF CURRENT SERVICE
12 JULY 1955TERM OF CURRENT SERVICE
Six (6) years

PRIOR SERVICE (As to each prior period of service, give inclusive dates of service and organization in which serving at termination.)

28 May 1952 to 11 July 1955. Serving with 7200th Installations Squadron, APO 30, USAF at time of last discharge.

DATA AS TO WITNESSES

NAME OF WITNESS	ADDRESS	WITNESSES FOR	
		PROSECUTION	ACCUSED
A/2C Michael Hofer	3153rd Air Base Wing	X	
Major Charles L. Norden	3153rd Air Police Squadron	X	
S/Sgt Robert E. Clark	3153rd Air Police Squadron	X	
Major William S. Donaldson	3153rd Air Police Squadron	X	
1/Lt. Lloyd D. G. G.	3153rd Air Police Squadron	X	
W/Sgt Nelson L. Evans	3153rd Support Squadron	X	
W/Sgt C. D. Briggs	3153rd Air Police Squadron	X	

DOCUMENTS AND OBJECTS

LIST AND DESCRIBE IF NOT ATTACHED TO CHARGES, NOTE WHERE IT MAY BE FOUND

- 1,332 yards of Lent's Rotte Goods and 1,713 yards of fabric material, stolen Government Property, returned to 7200th Installations Squadron, Mouassour Air Depot, Morocco.
- Air Police Report of investigation Case Number 2710/7, Mouassour Air Depot, Morocco, dated 11 July 1957: Attached.

DATA AS TO RESTRAINT

NATURE OF ANY RESTRAINT OF ACCUSED	DATE	LOCATION
Confined Base Stockade	23 to 24 June 1957	Mouassour Air Depot, Morocco
Confined Base Stockade	16 July 1957	Mouassour Air Depot, Morocco

(released)

Charge I : Violation of the Uniform Code of Military Justice, Article 121

Specification In that Airman Second Class Howard B. Donaldson Jr., Air Basic Ralph C. Hall, United States Air Force, Headquarters Squadron 3153rd Air Base Wing, APO 30, USAF, and Dominic Gagliardo, Department of Air Force Civilian, 3153rd Air Base Wing, APO 30, USAF, acting jointly, and in pursuance of common intent, did, at Nouasseur Air Depot, Morocco, on or about 20 June 1957, steal leatherette goods and olive drab fabric material, of a total value of about \$4,690.00, the property of the United States.

Charge II: Violation of the Uniform Code of Military Justice, Article 81

Specification In that Airman Second Class Howard B. Donaldson Jr., Airman Basic Ralph C. Hall, United States Air Force, Headquarters Squadron, 3153rd Air Base Wing, APO 30, USAF, and Dominic Gagliardo, Department of Air Force Civilian, 3153rd Air Base Wing, APO 30, USAF, did, at Nouasseur Air Depot, Morocco, on or about 20 June 1957, conspire with each other to commit an offense under the Uniform Code of Military Justice, to wit: larceny of leatherette goods and olive drab fabric material, of a value of about \$4,690.00, the property of the United States, and in order to effect the object of the conspiracy, the said Airman Second Class Howard B. Donaldson Jr., did contact Airman Second Class Michael Hofer to procure a United States government truck to haul said property off the limits of Nouasseur Air Depot, Morocco.

ROBERT V. VON WENGE

CAPTAIN

MEMPHIS, 3153rd Air Base Wing

AFFIDAVIT

Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above-named accused this 18TH day of JULY, 19 57 and signed the foregoing charges and specifications under oath that he is a person subject to the Uniform Code of Military Justice, and that he either has personal knowledge of or has investigated the matters set forth therein, and that the same are true in fact, to the best of his knowledge and belief.

Robert V. Wenge
SIGNATURE

1st Lt, 3153rd Air Base Wing, APO 30,
NAME AND ORGANIZATION OF OFFICER
ADMINISTERING OATH **USAF**

Assistant Adjutant

OFFICIAL CHARACTER, AS ADJUTANT, SUMMARY COURT, ETC.
SEE PARAGRAPH 24, MCN, 1951, AND ARTICLES 24 AND 13A

Officer administering oath must be a commissioned officer.

18 JUL 1957
DATE

I have this date informed the accused of the charges against him.

Robert V. Wenge
SIGNATURE

Captain, 3153rd Air Base Wing, APO 30,
NAME AND ORGANIZATION **USAF**

Headquarters, 3153rd Air Base Wing
DESIGNATION OF COMMAND OR OFFICER EXERCISING
SUMMARY COURT-MARTIAL JURISDICTION

MEMPHIS, TENN
PLACE

18 July 1957
DATE

The sworn charges above were received at **190C**

having this date.

FOR THE COMMANDER
Robert E. Thompson
SIGNATURE, NAME, AND OFFICIAL CAPACITY OF OFFICER SIGNING

1ST INDORSEMENT

Hq. Southern Air Materiel Area Group, Hatteras Air Depot, Hatteras, 14 Aug 57

Referred for trial to the court-martial appointed by

General

Para 1, Special Order Number 141,

and 25 July 1957 as amended by Para 7, Special Order Number 141, and 1 Aug 57 as

amended by Para 2, Special Order Number 141, and 14 Aug 57, Hq. Southern Air Materiel Area Group (AMAG), APO 30, New York, N.Y.

To be tried in a joint trial at

A-1

BY

COMMANDER OR ORDER

THE CHAIRMAN

Robert E. Thompson
SIGNATURE, NAME, AND OFFICIAL CAPACITY OF OFFICER SIGNING

I have served a copy hereto on each of the above-named accused, this 26TH day of August

1957

Jay P. Couge
SIGNATURE

1st LT, Hq SAMA(E)
NAME AND ORGANIZATION OF TRIAL COUNSEL

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(Title omitted)

**Excerpts From Traverse of Return and Answer to Rule to
Show Cause—Filed December 16, 1957**

1. The Return and Answer of respondents admits that petitioner, a civilian, is being detained by virtue of a sentence of conviction of a General Court Martial held under the purported authority of Article 2(11) of the Uniform Code of Military Justice, 50 U.S.C. Sec. 552(11). Respondents thus place in issue the basic question of the constitutionality of Article 2(11) as applied to this petitioner in the particular circumstances of this case.

The undisputed facts may be summarized thus:

In February 1954, petitioner, an American citizen, accompanied by his wife, went to Morocco. He went at his own expense via private commercial transportation with an ordinary passport. Subsequently, on March 31, 1954, he was hired by the Civilian Personnel Office, Nouasseur Air Depot (near Casablanca, Morocco) as an Electrical Lineman. His duties are said to be: "Maintains and repairs airfield lighting, inspects and repairs electrical conducts, transformers, lights, controls, ducts and manholes." Petitioner has no clearance for security or classified information and has no special technical skill or occupation that cannot be provided from within the Armed Forces.

34 During all of the times here involved, petitioner resided, with his wife and child, in Casablanca, Morocco, in a private apartment house.

As part of his compensation, he received an allowance for his living quarters and was permitted to purchase at the Commissary and Base Exchange, for which he was issued a ration card. Medical and dental care were available to him but appear to have been used only in treatment of an injury to his right hand and for two physical examinations. Whether these visits were in connection with injuries received during his employment is not known.

In June of this year, petitioner was accused of violating Articles 121 and 81 of the Uniform Code of Military

Justice, felonies for which he might be liable to 10 years imprisonment and a fine of apparently unlimited amount. He was arrested and detained in the Base Stockade, Nouasseur Air Depot, and subsequently tried by a General Court Martial, whose jurisdiction he challenged on the constitutional grounds here asserted. The Court Martial found him guilty and sentenced him to three years at hard labor and a fine of \$1,000.00. The Court Martial proceedings were on December 10, 1957 (after the filing of this Petition) reviewed and the conviction under Article 121 was disapproved but the sentence remained unchanged.

.

43 6. Respondents contend the "*practical necessity*" requires court-martial jurisdiction over civilian employees in peacetime. Petitioner denies that the practical necessities can override the specific constitutional guarantees. In *McCune v. Kilpatrick*, 53 F. Supp. 80 (D.E.D. Va. 1943), the Court said:

"The civil courts may not surrender a civilian to the jurisdiction of the military for expediency, convenience or even necessity, for to do so would destroy those constitutional rights and privileges guaranteed to citizens of this country."

If practical necessity is to govern the decision in the case at bar, then it is petitioner's position that practical necessity does *not* require court martial jurisdiction in this case. Petitioner disputes the factual assertion by respondents. If the Court deems this matter material, a hearing should be held to adduce testimony as to the scope and dimensions of the problem and the alternative solutions available.

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Respectfully submitted,

MICHAEL A. SCHUCHAT
Michael A. Schuchat,
Attorney for Petitioner.

GEIGER, HARMEL AND SCHUCHAT,
Of Counsel.

Certificate of Service (omitted in printing)

(File endorsement omitted)

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(Title omitted)

Supplemental Memorandum—Filed January 10, 1958

Come now the respondents, Neil H. McElroy, Secretary of Defense, James H. Douglas, Secretary of Air Force and General Thomas D. White, Chief of Staff, United States Air Force, by their attorney, the United States Attorney in and for the District of Columbia; and respectfully represent to the Court as follows:

1. On January 7, 1958, the petitioner was transferred to Branch United States Disciplinary Barracks, New Cumberland, Pennsylvania, and he is presently in confinement at that installation.

OLIVER GASCH

Oliver Gasch

United States Attorney

EDWARD P. TROXELL

Edward P. Troxell, *Principal**Assistant United States Attorney*

JOHN W. KERN III

John W. Kern III

Assistant United States Attorney

Certificate of Service (omitted in printing)

(File endorsement omitted)

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Habeas Corpus No. 123-57

UNITED STATES OF AMERICA EX REL DOMINIC GUAGLIARDO,
Petitioner,

v.

NEIL H. McELROY, Secretary of Defense, et al.,
Respondents.

Opinion—January 13, 1958

Irwin Geiger, Esq., and Michael A. Schuchat, Esq., both of Washington, D. C., for the petitioner.

Oliver Gasch, Esq., United States Attorney; Edward F. Troxell, Esq., Principal Assistant United States Attorney; and John W. Kern III, Esq., Assistant United States Attorney, all of Washington, D. C., for the respondents.

The question presented in this *habeas corpus* proceeding, is whether a civilian employee attached to the armed forces of the United States stationed in a foreign country, is subject to trial by court-martial for an offense connected with his activities.

The issue arises on a return to an order to show cause granted in response to a petition for a writ of *habeas corpus* filed by a prisoner confined at an Air Depot in Morocco, against the Secretary of Defense, the Secretary of the Air Force, and the Chief of Staff of the United States Air Force. The petitioner, Dominic Guagliardo, was
48 employed by the Department of the Air Force as an electrical lineman at Nouasseur Air Depot, Morocco. On July 18, 1957, he was charged with larceny of Government property consisting of leatherette goods and olive drab fabric material, valued at about \$4690. In

addition, he and two other persons were charged with conspiracy to commit larceny. He was tried and convicted by a general court-martial convened at the Air Depot and was sentenced to confinement at hard labor for three years and a fine of \$1,000. The convening authority disapproved the finding of guilty on the first of the two charges, but approved the sentence as to the second charge. The petitioner is now a prisoner at the Base Stockade, at the above mentioned Air Depot in Morocco. The matter still remains to be considered by the Board of Review of the Office of the Judge Advocate General, as well as by the Judge Advocate General. If after going through these channels the sentence is approved, the petitioner will still have the right to petition the United States Court of Military Appeals for a review of any alleged error of law.

The petitioner has applied to this court for a writ of *habeas corpus* on the ground that he has been deprived of his constitutional rights to indictment by a grand jury and trial by jury. The respondents filed a return and answer setting forth the prior proceedings in detail and asserting that civilian employees who accompany or serve with the armed forces of the United States in the field, are subject to trial by court-martial. A traverse to the return has been filed by counsel for the petitioner. The matter was heard on the petition, the return and the traverse.

In limine the respondents interposed the objection that the petitioner had not exhausted all the remedies
49 available to him before military tribunals and that, therefore, this proceeding has been brought prematurely. This contention would be completely sustained by *Gusik v. Schilder*, 340 U. S. 128, if that case stood alone. Subsequent decisions of the Supreme Court, however, throw a different light on this question.

The case of Toth is illuminating in this connection. Toth had served in the Air Force in Korea. After he was discharged from the service, he returned to his home in Pittsburgh, and resumed his civilian occupation. He was later arrested by the Air Force police and transported to Korea for trial by court-martial on a charge of murder alleged to have been committed while he was in the service. The District Court for the District of Columbia issued and sustained a writ of *habeas corpus*, and discharged Toth

on the ground that the Uniform Code of Military Justice did not authorize the removal of a civilian to a distant point for trial by court-martial.¹ The court expressly stated that the objection to the jurisdiction of the court-martial to try Toth, based on constitutional grounds was premature. The Court of Appeals for the District of Columbia Circuit reversed the order of the District Court.² On certiorari the Supreme Court reversed the decision of the Court of Appeals and reinstated the action of the District Court.³ The Supreme Court, however, did not confine itself to passing on the narrow point on which the District Court predicated its decision, but held broadly that Congress lacked power to authorize trial by court-martial of a person in the position of Toth. This
 50 conclusion was reached in spite of the fact that Toth had made no effort to exhaust his remedies within the military system.

In *Reid v. Covert*, 354 U. S. 1, 4, the Supreme Court held that there was no constitutional authority to try the respondent by court-martial and directed that she be released from custody, in spite of the fact that she had not exhausted her remedies in the military system. As appears from the opinion of the court, a re-trial by court-martial as a result of a reversal of the conviction by the Court of Military Appeals was pending when the case was argued and decided by the Supreme Court. To be sure, it does not appear that the objection that was a failure to exhaust prior remedies was urged by the Government in either of these cases. Nevertheless, it could have been raised by the Court *sua sponte*. It would not be appropriate for this court to assume that in spite of its decision in the *Gusik* case, *supra*, the Supreme Court overlooked the point in the *Toth* and *Reid* cases. That this matter was not mentioned in either opinion, may be due merely to the fact that the Court did not consider it worthy of discussion. This court cannot reasonably reach any conclusion other than that the *Gusik* case has been overruled *sub silentio* by the *Toth* and *Reid* cases, insofar as it

¹ *Toth v. Talbott*, 114 F. Supp. 468.

² *Talbott v. United States ex rel. Toth*, 94 U.S. App. D.C. 28.

³ *United States ex rel. Toth v. Quarles*, 350 U.S. 11.

applies to the necessity of exhausting other available remedies in a case in which the jurisdiction of a court-martial is challenged on constitutional grounds. Consequently, the objection that the petitioner has failed to exhaust all of his remedies within the military system is overruled.

This brings us to a consideration of the merits. Jurisdiction of courts-martial over the person of the
 51 petitioner in this proceeding is predicated on Article
 2 of the Uniform Code of Military Justice (formerly
 50 U.S.C. § 552; now 10 U.S.C. § 802), the pertinent provisions of which are as follows:

“The following persons are subject to this chapter:

.

“(11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, *persons serving with, employed by, or accompanying the armed forces outside the United States* and outside the following: that part of Alaska east of longitude 172 degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands.” (Emphasis supplied.)

It is contended by the petitioner that subsection (11), insofar as it is applicable to civilians, is unconstitutional in that it deprives them of the right not be prosecuted for a criminal offense except by indictment by a grand jury, and of the right to trial by jury.

The pertinent constitutional provisions are the following:

Article I, Section 8, Clause 14:

“The Congress shall have Power . . . To make Rules for the Government and Regulation of the land and naval forces;”

Article III, Section 2 Clause 3:

“The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State,

the Trial shall be at such Place or Places as the Congress may by Law have directed."

The Fifth Amendment, Clause 1:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, . . ."

52 *The Sixth Amendment, Clause 1:*

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . ."

It is well established beyond the necessity of discussion that the power of the Congress to make rules for the government and regulation of the land and naval forces, includes the authority to provide for trials by courts-martial, and that in cases cognizable by military tribunals, neither the right to indictment by grand jury as a basis for a prosecution, nor the right to a trial by jury is applicable.⁴ The ultimate question to be decided in connection with the resolution of the constitutional issue in this case, is to what groups of persons may the Congress extend court-martial jurisdiction. More specifically the query is whether for the purposes of Article I, Section 8, Clause 14, the phrase, "land and naval forces", is to be limited to commissioned and enlisted personnel in uniform, or whether it may include civilian employees who are attached to the land or naval forces and perform duties in connection with their maintenance or operation.

A consideration of this topic should properly begin with a scrutiny of the rulings of the Supreme Court in this field. In making such an analysis, we must be guided by the precepts enunciated by Chief Justice Marshall in *Cohens v. Virginia*, 6 Wheat. 264, 399-400:

⁴ *Ex parte Milligan*, 4 Wall. 2, 123.

Ex parte Quirin, 317 U.S. 1, 40.

Whelchel v. McDonald, 340 U.S. 122, 127.

53 "It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

Our attention must be directed to two cases. In *United States ex rel. Toth v. Quarles*, 350 U. S. 11, it was held that a former member of the armed forces who had been discharged from the service and was no longer within the control of the armed forces, was not subject to trial by court-martial for an offense committed during his term of service.

Reid v. Covert, 354 U. S. 1, involved the status of a wife of a member of the armed forces of the United States, who accompanied her husband while he was stationed on foreign soil. This case was heard and decided by eight members of the Supreme Court, as Mr. Justice Whittaker did not participate. Mr. Justice Black delivered an opinion in which the Chief Justice, Mr. Justice Douglas and Mr. Justice Brennan joined, and in which the view was expressed that civilian wives, children, and other dependents of members of the armed forces, could not be constitutionally subjected to trial by court-martial, since they could not be regarded as any part of the armed forces. It must be emphasized that this conclusion was reached by only four members of the Court. Mr. Justice Frankfurter and Mr. Justice Harlan wrote separate opinions concurring in the result, but limiting their conclusion to the view that in capital cases civilian dependents of members of the armed forces could not be constitutionally tried by court-martial. Mr. Justice Clark, with whom Mr. Justice Burton joined, wrote a dissenting opinion. Consequently, the only point on

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which a majority of the Justices concurred is that in a capital case a civilian dependent of a member of the armed forces may not be tried by court-martial. Six Justices joined in that view.

The state of the Supreme Court's decisions on this question may, therefore, be summarized as follows:

A former member of the armed forces, who has been discharged and is no longer within the control of the military, is not subject to trial by court-martial for an offense committed during his term of service.

A wife, a child, or other dependent of a member of the armed forces is not subject to trial by court-martial in a capital case.

The Supreme Court has not determined whether a dependent accompanying a service man is subject to trial by court-martial in a case other than capital.

Similarly, the Supreme Court has never had occasion to decide whether a civilian employee attached to the armed forces in a foreign country, is subject to trial by court-martial.

Obviously, the position of civilian employees is not only different in fact, but distinct in principle from that of members of service men's families. The use of civilian employees is necessary and sometimes indispensable for the operation of the armed forces. To that extent they may be deemed part of the armed forces. This is not the case with families of service men. The families are present for the mutual comfort and happiness of the military personnel and their wives and children, but the armed forces can readily operate without the presence of families.

Mr. Justice Black in *Reid v. Covert, supra*, at page 23, expressly recognized that "there might be circumstances

55 where a person could be 'in' the armed services for purposes of Clause 14 even though he had not formally been inducted into the military, or did not wear a uniform." He added, "But the wives, children and other dependents of servicemen cannot be placed in that category, . . ." Thus, members of the Supreme Court have recognized a distinction in principle between depend-

ents of servicemen and civilian employees of the armed forces.

In determining whether the words "land and naval forces" as used in Article I, Section 8, Clause 14, of the Constitution, are to be restricted to the uniformed personnel formally mustered into the service, or should also include civilian employees attached to the armed forces, it is necessary to consider the background of the constitutional provision.⁵ It is also essential to bear in mind certain general historic principles of constitutional interpretation and construction. The constitutional history of the United States demonstrates that one of the forces that transformed a weak, loose confederacy of thirteen small colonies nestled against the Atlantic Coast into a large, powerful and prosperous nation, has been the fact that a broad and liberal construction has been placed by the Supreme Court on the enumerated powers of the Congress, thus enabling the building of a strong central government that can withstand the vicissitudes of time. This policy was inaugurated by the historic, epoch-making opinions of Chief Justice Marshall, who was an outstanding statesman, endowed with far-sighted vision, as well as a renowned jurist. It would seem surplusage to quote his memorable words in *McCulloch v. Maryland*, 4 Wheat. 316, that
 56 ring through the ages. They are often repeated and are all too familiar.

A similar but less well known expression is found in an opinion of Justice Story in *Martin v. Hunter*, 1 Wheat. 304, 326-327:

"The constitution unavoidably deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution. It was foreseen, that this would be perilous and difficult, if not an impracticable, task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence.

⁵ *Gompers v. United States*, 233 U.S. 604, 610.

It could not be foreseen, what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications, which, at the present, might seem salutary, might, in the end, prove the overthrow of the system itself. Hence, its powers are expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its powers, as its own wisdom, and the public interests, should require."⁶

The historic background of Clause 14 is significant. It is hardly necessary to advert to the fact that the framers of the Constitution were men of profound learning, but that they were also men of broad practical experience, who were in close contact with the problems of their
57 day and who had a thorough knowledge of the needs in the light of which the Constitution was being framed. The British Articles of War of 1765, which were in force at the beginning of the Revolutionary War, placed civilian employees, contractors and suppliers connected with the Army under military discipline. Thus Article XXIII provided:⁷

"All Suttlers and Retainers to a Camp, and all persons whatsoever serving with Our Armies in the Field, though no inlisted Soldiers, are to be subject to orders, according to the Rules and Discipline of War."

The American Revolutionary Army was governed by similar provisions. Article XXXII of the Articles of War, adopted by the Continental Congress, on June 30, 1775, read as follows:⁸

⁶ Among the many cases expressing and applying the doctrine of broad construction of congressional powers, the following are typical:

Gibbons v. Ogden, 9 Wheat. 1, 187-9, 222.

Legal Tender Cases, 12 Wall. 457, 532.

Juilliard v. Greenman, 110 U.S. 421, 439.

Matter of Strauss, 197 U.S. 324, 330-331.

⁷ William Winthrop, *Military Law and Precedents*, 2d Ed., p. 941.

⁸ Journals of the Continental Congress, Volume II, 1775, p. 116.

“All suttlers and retailers to a camp, and all persons whatsoever, serving with the continental army in the field, though not inlisted soldiers, are to be subject to the articles, rules and regulations of the continental army.”

A like enactment is found in Section XIII, Article 23, of the Articles of War, adopted by the Continental Congress on September 20, 1776:⁹

“All suttlers and retainers to a camp, and all persons whatsoever serving with the armies of the United States in the field, though no inlisted soldier; are to be subject to orders, according to the rules and discipline of war.”

58 It was against this background that the members of the Constitutional Convention of 1787 formulated the provision empowering the Congress to make rules and regulations for the government of the land and naval forces of the United States. It is reasonable to infer that the framers of the Constitution were familiar with previous English and American usage in the matter and, therefore, employed the term “land and naval forces” in a broad sense. Such has also been the continuous construction of this phrase by the Congress from the early days of the Republic. Early congressional interpretation of a constitutional provision at a time when some of the Founding Fathers were still living and active, is particularly significant. Great weight must be attached to such contemporaneous construction.¹⁰ Similarly, continuous construction of a constitutional provision by repeated Acts of Congress and long acquiescence in such an interpretation “entitles the question to be considered at rest”.¹¹

⁹ Journals of the Continental Congress, Volume V, 1776, p. 800.

¹⁰ *Cohens v. Virginia*, 6 Wheat. 264, 418.

Cooley v. Board of Wardens of Port of Philadelphia et al., 12 How. 299, 315.

Lithographic Co. v. Sarony, 111 U.S. 53, 57.

McPherson v. Blacker, 146 U.S. 1, 27.

Knowlton v. Moore, 178 U.S. 41, 56.

¹¹ *Prigg v. Pennsylvania*, 16 Pet. 539, 621.

See also, *The Laura*, 114 U.S. 411, 416.

Springer v. United States, 102 U.S. 586, 599.

Field v. Clark, 143 U.S. 649, 691.

The Articles of War enacted by Congress from time to time have invariably applied court-martial jurisdiction to civilian employees and similar persons attached to the armed forces in the field. The first group of Articles of

War passed by the Congress were approved on 59 April 10, 1806. Article 60 provided as follows:¹²

“Article 60. All suttlers and retainers to the camp, and all persons whatsoever, serving with the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders, according to the rules and discipline of war.”

The Articles of War were revised in 1874. Article 63 of that revision reads as follows:¹³

“Art. 63. All retainers to the camp, and all persons serving with the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders, according to the rules and discipline of war.”

Another revision of the Articles of War was dated August 29, 1916. Article 2 enumerates the groups of persons subject to military law, and includes the following:¹⁴

“(d) All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles; . . .”

Precisely the same provision is found in the Articles of War passed in 1920.¹⁵ The Uniform Code of Military

¹² 2 Stat. 366.

¹³ 2 Rev. Stat. 236 (2d Ed., 1878).

¹⁴ 39 Stat. 651.

¹⁵ 41 Stat. 787, Art. 2(d).

Justice, adopted in 1952, contains a similar provision, which has been heretofore quoted.

60 Although, as indicated above, the precise question involved in the instant case has never been passed upon by the Supreme Court, other Federal courts that have had occasion to deal with this topic have uniformly held that civilian employees accompanying or serving with the armed forces of the United States outside of the territorial jurisdiction of the United States may be subjected to court-martial jurisdiction, *Hines v. Mikell* (C.C.A. 4th) 259 Fed. 28; *Ex parte Falls* (D.-N.J.) 251 Fed. 415; *Ex parte Jochen*, (S.D.-Tex.) 257 Fed. 200; *McCune v. Kilpatrick*, 53 F. Supp. 80; *In re Varney's Petition*, 141 F. Supp. 190. The United States Court of Military Appeals has reached the same conclusion, *United States v. Marker*, 1 USCMA 393; *United States v. Weiman*, 3 USCMA 216; *United States v. Burney*, 6 USCMA 776.¹⁶

The final clause of Article I, Section 8, of the Constitution sometimes denominated by historians as the "elastic clause", empowers the Congress to make all laws which shall be necessary and proper for carrying into execution "the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." That a law subjecting personnel of the type involved in this case to trial by court-martial is necessary and proper for carrying into execution the power to make rules for the government and regulation of the land and naval forces, is demonstrated by a consideration of the consequences of any conclusion that would deny this authority to the Congress. It is manifestly essential to enforce law and order at stations maintained by the armed forces of the United States

61 In foreign countries. The use of civilian employees is frequently indispensable in connection with the operation of these stations. If court-martial jurisdiction may not be exercised in respect to such civilians, other means of law enforcement would create difficulties that in some instances might prove insuperable. One possible course is to establish Federal civilian courts abroad for the trial of offenses committed by civilian employees of

¹⁶ The opinion of Judge Latimer in *United States v. Burney*, cited in the text, contains an exhaustive and scholarly discussion of this subject.

the armed forces. Whether foreign governments would permit the exercise of such extra-territorial jurisdiction is doubtful. It has never been done in modern times except in occupied territory and except in the Orient by special agreements, which have been cast into discard. Moreover, it would not be practicable to obtain juries in foreign countries, for no one could be required to serve on a jury. Similarly, it would not be possible to issue compulsory process against witnesses.

Another possibility would be to bring such offenders back to the United States for trial. Such an arrangement would not be practicable as to serious offenses, for there would be no way of compelling the presence of witnesses. They could be induced to come only on a voluntary basis. As to petty offenses, this course would be too costly and cumbersome. The third possible course is to turn such offenders over to foreign courts for trial.¹⁷

62 In the light of the foregoing discussion, the court reaches the conclusion that civilian employees attached to the armed forces of the United States abroad may be subjected to trial by court-martial and that hence Article 2, subsection (11) of the Uniform Code of Military Justice is constitutional; that the court-martial by which the petitioner was tried had jurisdiction over him; and that, consequently, the petitioner is not unlawfully restrained of his liberty.

The order to show cause is discharged and the petition is dismissed.

ALEXANDER HOLTZOFF
United States District Judge.

January 13, 1958.

¹⁷ See concurring opinion of Mr. Justice Harlan in *Reid v. Covert*, 354 U. S. 1, p. 76, note 12.

Joseph M. Snee, S.J., and Kenneth A. Pye, in their work on "*Status of Forces Agreement; Criminal Jurisdiction*", p. 44, state that the fundamental choice is not between a Federal civilian court and an American court-martial, but between an American court martial and a foreign court.

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(File Endorsement Omitted)

Notice of Appeal—Filed January 15, 1958

Notice is hereby given this 15th day of January, 1958, that Petitioner hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 14th day of January, 1958 in favor of Respondents against said Petitioner.

MICHAEL A. SCHUCHAT
Attorney for Petitioner

Serve
U S Attorney
Please.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Filed Sep. 12, 1958, Joseph W. Stewart, Clerk

No. 14304

UNITED STATES OF AMERICA, EX REL
DOMINIC GUAGLIARDO, *Appellant*

v.

NEIL H. McELROY, SECRETARY OF DEFENSE,
DEPARTMENT OF DEFENSE, ET AL., *Appellees*

Appeal from the United States District Court for the
District of Columbia

Opinion—September 12, 1958

Mr. Michael A. Schuchat for appellant.

Mr. John W. Kern, III, Assistant United States Attorney, with whom *Messrs. Oliver Gasch*, United States Attorney, and *Lewis Carroll*, Assistant United States Attorney, were on the brief for appellee.

Before EDGERTON, *Chief Judge*, and FAHY and BURGER,
Circuit Judges.

FAHY, *Circuit Judge*: Appellant was a civil service employee of the Department of the Air Force of the United States, employed as an electrical lineman at the Nouasseur Air Depot near Casablanca, Morocco. His duties were to maintain and repair airfield lighting and to inspect and repair electrical conduits, transformers, lights, controls, ducts, and manholes. He lived with his wife off the Depot, in nearby Casablanca. He was entitled to quarters allowance, mail, Commissary and Base Exchange privileges, a United States Air Force ration card, membership in the Air Force Officers Club, and medical and dental care at the Depot.

On July 18, 1957, he and two enlisted men¹ were charged with stealing certain leatherette goods and fabric material at the Depot, in violation of Art. 121, Uniform Code of Military Justice, 10 U.S.C. § 921 (Supp. V, 1958), and with conspiring to commit larceny, in violation of Art. 81, U.C.M.J., 10 U.S.C. § 881 (Supp. V, 1958). They were tried by a general court-martial and found guilty. Appellant was sentenced to pay a fine of \$1,000 and to be confined at hard labor for three years.

In due course the case reached the Board of Review in the Office of the Judge Advocate General, pursuant to Art. 66, U.C.M.J., 10 U.S.C. § 866 (Supp. V, 1958). Appellant then petitioned the United States District Court for the District of Columbia for a writ of habeas corpus. He contended that the military authorities lacked jurisdiction to try him and that accordingly his confinement under the court-martial sentence was unlawful. Relief was denied by the District Court, opinion reported at 158 F. Supp. 171, followed by this appeal.²

Appellees³ contend that the jurisdictional question is prematurely raised because appellant has not exhausted the judicial processes available to him under the Uniform Code

¹ One or more civilian Moroccan nationals were also alleged to have been parties to the same transaction. They have been tried in the regular courts of Morocco.

² We ordered appellant admitted to bail pending the appeal.

³ Neil H. McElroy, Secretary of Defense, James H. Douglas, Secretary of the Air Force, and General Thomas D. White, Chief of Staff, United States Air Force.

73 of Military Justice. They rely upon *Gusik v. Schilder*, 340 U.S. 128. But that case we think is inapposite, for there court-martial jurisdiction over the accused unquestionably existed since he was a member of the United States Army. He sought to attack collaterally a court-martial judgment because of alleged errors in the court-martial proceedings, without exhausting the administrative remedies available for their correction. Here, in contrast, the question is whether appellant is subject to court-martial jurisdiction at all. Habeas corpus proceedings were used to determine such a question in *Reid v. Covert*, 354 U.S. 1, and *United States ex rel. Toth v. Quarles*, 350 U.S. 11.⁴ The point was not discussed, but in view of *Gusik v. Schilder*, *supra*, could not have been overlooked by the Supreme Court, especially as the Court in *Reid v. Covert* specifically noted that the petition was brought "while Mrs. Covert was being held . . . pending a proposed retrial by court-martial . . ." 354 U.S. at 4. If appellees have no court-martial jurisdiction whatever over appellant the Great Writ is available to release him from their custody.

Appellees defend their jurisdiction solely by reason of Art. 2, U.C.M.J., 10 U.S.C. § 802 (Supp. V, 1958). This provision in terms does extend court-martial jurisdiction to appellant for the offense charged. The provision reads:

The following persons are subject to this chapter
[The Uniform Code of Military Justice]:

. . . .

74 (11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States

⁴ Moreover, the highest court available under the Uniform Code of Military Justice has consistently upheld jurisdiction over persons in the same legal posture as appellant. Appellant should not be required to await a similar decision in his case. *United States v. Wilson*, No. 9638, U.S.C.M.A., March 28, 1958; *United States v. Rubenstein*, 7 U.S.C.M.A. 523, 22 C.M.R. 313; *United States v. Burney*, 6 U.S.C.M.A. 776, 21 C.M.R. 98; *United States v. Marker*, 1 U.S.C.M.A., 393, C.M.R. 127.

Appellant's contention is that this provision is unconstitutional as applied to him, a civilian employee, in time of peace.

The question thus raised must be decided in light of the decision of the Supreme Court in *Reid v. Covert, supra*. The Court there held that in a capital case the wife of a member of the armed forces, who accompanied her husband abroad and there killed him, could not be tried by court-martial—that Art. 2 subparagraph (11), *supra*, was unconstitutional as so applied. The basis for the decision was that the wife was entitled to a jury trial as provided by Art. III, § 2 of the Constitution and to the safeguards of the Fifth and Sixth Amendments.

Article III, § 2 of the Constitution provides that the trial of all crimes excepting cases of impeachment shall be by jury. The pertinent Fifth Amendment provision is that no person shall be held to answer for a capital or otherwise infamous crime unless upon presentment or indictment of a grand jury except in cases arising in the land or naval forces. The pertinent Sixth Amendment provision is that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed. None of these provisions was complied with in *Reid v. Covert*. And none was complied with in the present case.

Appellees point, however, as was done in *Reid v. Covert*, to Art. I, § 8, cl. 14, of the Constitution, which empowers Congress "to make Rules for the Government and Regulation of the land and naval Forces." It is urged that this provision, together with the Necessary and Proper Clause of the Constitution, Art. I, § 8, cl. 18, has enabled Congress to establish the court-martial jurisdiction specified in subparagraph (11) of Art. 2, U.C.M.J., *supra*, by
75 carving out exceptions to the application of Art. III, § 2 of the Constitution and of the Fifth and Sixth Amendments. Clearly the Constitution does authorize such an exception for members of "the land and naval Forces." But in *Reid v. Covert* the Chief Justice and Mr. Justice Black, Mr. Justice Douglas, and Mr. Justice Brennan, in the opinion written by Mr. Justice Black, would not permit an exception related to the "land and naval Forces" to in-

clude civilians unless in rare and unusual circumstances; and Mr. Justice Frankfurter and Mr. Justice Harlan would not permit such an exception to include a civilian wife charged with a capital offense, though accompanying her service husband with the forces outside the United States.

The same considerations, set forth elaborately in the opinions, which thus brought agreement among a majority of the Supreme Court as to the wife in *Reid v. Covert*, would not permit a civilian employee in the situation of appellant to be tried by the United States by court-martial on a capital charge. He would be entitled to a civilian trial by jury. We can think of no constitutional basis for approving the court-martial of such an employee for a capital offense which would not apply equally to Mrs. Covert. Of course the case before us is not a capital one, but if Mrs. Covert or an employee such as appellant could not be tried by court-martial on a capital charge, notwithstanding the provision of the Military Code purporting to authorize such a trial, the existing congressional plan for extending court-martial jurisdiction to persons accompanying or employed by the armed forces outside the United States exceeds constitutional bounds. Congress did not exclude capital cases. The statute embraces without exception persons "employed by" the forces outside the United States and thus would deprive all civilians in that category of the right to trial by jury for any offense defined in the Military Code, capital or non-capital, and regardless of the nature of the offense or of the relation of the offense or of the employment to the security, discipline, or effectiveness of the forces. The scope of Art. III, § 2 of the Constitution and of the Fifth and Sixth Amendments, as expounded in *Reid v. Covert*, prevents such a curtailment of trial by jury and concomitant extension of court-martial jurisdiction over civilians in time of peace.

This is not to say that legislation bringing some civilian employees within court-martial jurisdiction for some offenses would necessarily be unconstitutional. Cf. *Reid v. Covert*, 354 U.S. at 22-23. It is reasonable to assume that the fullness of the Necessary and Proper Clause, considered with the authority of Congress "to make Rules for the Government and Regulation of the land and naval Forces," and considered also with the present and potential respon-

sibilities of the United States throughout the world, has not been exhausted. But *Reid v. Covert* plainly shows that these sources of legislative power do not sustain the all-inclusive extension of military jurisdiction over civilian employees attempted by subparagraph (11) of Art. 2 of the Military Code.

Since the intended broad sweep of subparagraph (11) is unconstitutional the question arises whether the courts should rewrite the provision along narrower lines and decide the question of its validity as applied to this particular employee for this particular offense. There are numerous instances in which the Supreme Court has held that such judicial reframing of legislation should not be attempted. *Butts v. Merchants & Miners Transp. Co.*, 230 U.S. 126; *Employers' Liability Cases*, 207 U.S. 463, 496-504; *Illinois Cent. R. v. McKendree*, 203 U.S. 515, 528-30; *United States v. Ju Toy*, 198 U.S. 253, 262-63; *James v. Bowman*, 190 U.S. 127, 139-42; *Baldwin v. Franks*, 120 U.S. 678; *United States v. Harris*, 106 U.S. 629, 641-42; *Trade Mark Cases*, 100 U.S. 82, 98-99; *United States v. Reese*, 92 U.S. 214, 221. See, also, *Carter v. Carter Coal Co.*, 298 U.S. 238, 312-17; *Williams v. Standard Oil Co.*, 278 U.S. 235, 242; *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 518-22; *Hill v. Wallace*, 259 U.S. 44, 70.

77 In *Reese* the Court said:

We are, therefore, directly called upon to decide whether a penal statute enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. . . .

To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty.

We must, therefore, decide that Congress has not as yet provided by "appropriate legislation" for the punishment of the offence charged in the indictment . . .

92 U.S. at 221.

In the *Trade Mark Cases*, *supra*, the same principle is stated as follows:

[I]t is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body.

100 U.S. at 98.⁵

In *Yu Cong Eng* the opinion was by Mr. Chief Justice Taft and contains this language:

The effect of the authorities we have quoted is clear to the point that we may not in a criminal statute reduce its generally inclusive terms so as to limit its application to only that class of cases which it was within the power of the legislature to enact, and thus save the statute from invalidity.

271 U.S. at 522.

The case at bar is not one where Congress has laid down a definition of jurisdiction in terms taken from the Constitution, leaving administrative agencies and the courts to apply the definition by a process of inclusion and exclusion according to the facts of particular cases, as was *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30-31.

Appellees urge, however, that since the statute contains a severability clause the doctrine of the *Reese* and kindred cases does not apply. Section 49(d) of the Act of August 10, 1956, Public Law 1028, 84th Cong.,⁶ provides:

⁵ While in *Reese* and the *Trade Mark Cases* the Court spoke of crimes defined so broadly as to be beyond constitutional authority, the principle invoked in those cases applies to this attempted extension of court-martial jurisdiction over crimes or persons in such broad terms as to be unconstitutional.

⁶ Public Law 1028 enacted into positive law Title 10 of the United States Code, containing, *inter alia*, the Uniform Code of Military Justice. The severability clause, though a part of Public Law 1028, was not enacted into Title 10. It can be found however in the note at page 293 of Supplement V of the 1952 Code (1958).

If a part of this Act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this Act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

As the Supreme Court held in *Williams v. Standard Oil Co.*, 278 U.S. 235, 241-42, the general effect of a severability clause is to substitute for the presumption that the legislature intended its act to be effective as an entirety, the opposite presumption of severability; that is, that the legislature intended the act to be divisible. It is said that this presumption must be overcome by considerations which make evident the inseverability of the provisions of the statute, or the clear probability that with the invalid part eliminated the legislature would not have been satisfied with what remains. In *Williams* itself, though the statute was not penal and also contained a severability clause the Court said:

it requires no extended argument to overcome the presumption and to demonstrate the indivisible character of the act under consideration.

278 U.S. at 242.

To the same effect is *Hill v. Wallace*, 259 U.S. 44, 70. Other cases relied upon by appellees include *Virginia Ry. v. System Federation No. 40*, 300 U.S. 515; *Wright v. Vinton Branch Bank*, 300 U.S. 440; *Crowell v. Benson*, 285 U.S. 22; *St. Louis, S.W. Ry. v. Arkansas*, 235 U.S. 350; *The Abby Dodge*, 223 U.S. 166; *United States v. Delaware and Hudson Co.*, 213 U.S. 366.

We do not think the severability clause authorizes us to divide subparagraph (11) so as to raise the question whether or not persons in appellant's situation might validly be subjected to court-martial jurisdiction. Though *Reid v. Covert* involved a wife and not a civilian employee, we know from that decision that the intended broad coverage of civilians, whether accompanying or employed by the forces abroad, exceeds constitutional bounds. Neither the severability clause nor any other provision affords any standard to guide a constitutional decision in the instant

case except the invalid standard of "persons . . . employed by" the armed forces outside the United States. We do not know how to subdivide this provision as Congress might have done if Congress had known it could not be upheld as written. The present severability clause shows only a very general intention to leave in effect all valid applications which are severable from invalid applications, giving no indication of what valid applications Congress thought would be severable. Should we undertake to say that the "persons employed by" clause is divisible so as to apply to
80 appellant we would be called upon to decide whether
 civilians in general employed by the armed forces
 outside the United States in time of peace are subject
to court-martial jurisdiction. Four members of the Supreme Court in *Reid v. Covert* have said in effect that they are not subject to such jurisdiction; and a majority of the court has not indicated that they are.

The Supreme Court has repeatedly referred to "the wisdom of refraining from avoidable constitutional pronouncements." *United States v. International Auto. Workers*; 352 U.S. 567, 590. This settled principle leads us to decide this case on the ground of nonseverability. Should we hold severable the application of the statute to appellant for the crime here charged, and go on to decide whether his conviction by court-martial was constitutional, obviously we would be deciding an important constitutional question. This course is not required and, therefore, should not be pursued in the circumstances of this case. The relevant precedents call for a decision on the basis spelled out in the *Reese* and kindred cases. Under those decisions we hold that subparagraph (11), which the Supreme Court has held is invalid as presently enacted, *Reid v. Covert*, is nonseverable into fragments which have not been specified by Congress or as to which Congress has not furnished criteria for a case-by-case judicial application. At least the application of the subparagraph to such a civilian as appellant, charged with such an offense as is here involved, cannot be validly carved out of the invalid general spread of that provision.

Our decision leaves Congress free if it so desires to rewrite the legislation with inclusion of criteria for court-martial jurisdiction in terms related more definitely to the

security, discipline, and effectiveness of the armed forces abroad. Or Congress might decide in light of *Reid v. Covert* to adopt some other course for the trial by the United States of civilians employed with such forces in time of peace. These legislative matters are not for us to determine; we mention these possibilities because they
81 bear upon the reasons for our decision that the present generality of subparagraph (11) is not to be subdivided by the courts so as to include appellant when the provision cannot validly include all who were intended to be covered by its terms as the statute left the hands of Congress. There is a complete absence of any legislative standard for the inclusion of appellant other than a standard that includes all civilian employees with the forces abroad, and that standard is so extensive as to be invalid as a basis for denial to civilians tried by the United States in time of peace of the protection of Article III, § 2 of the Constitution and of the Fifth and Sixth Amendments.⁷

Appellant should be discharged from the custody of appellees.⁸

Reversed and remanded.

BURGER, *Circuit Judge*, dissenting: The majority holds invalid a conviction of a civilian employed overseas by the Air Force, under Article 2, Uniform Code of Military Justice, for theft of Government property (valued at over \$4000). They do this even though, as I shall try to demonstrate, there is no other feasible means of law enforcement available at a foreign military base for crimes against the United States. While purporting to make a narrow decision, the consequence of the majority holding is to
82 strike down, for all practical purposes, all of the Uniform Code of Military Justice which relates to trial of non-military personnel in peacetime. This holding is

⁷ The principle invoked by appellees that a person may attack as invalid only the attempted invasion of his own rights is not applicable, for the attempted application here is to appellant himself.

⁸ Since submission of the case we have been advised by the United States Attorney that on June 9, 1958, the United States Court of Military Appeals has denied appellant's petition for a grant of review of his court-martial conviction.

reached by two steps (a) the authority of *Reid v. Covert*¹ and (b) that this court cannot sever the part of the statute relating to "persons accompanying . . . the armed forces outside the United States" from that part of the statute relating to "persons serving with, [or] employed by . . . the armed forces outside the United States." (10 U.S.C. § 802(11), Art. 2 UCMJ)

First, *Reid v. Covert* does not warrant the conclusion reached by the majority, and second, the statutory intent as well as the explicit language renders "persons serving with [or] employed by" so readily distinguishable and severable from "persons accompanying" members of the armed forces that no real problem of statutory construction is involved. I therefore see no escape from meeting the constitutional issue and do not think the majority has succeeded in avoiding that issue.

Article I, § 8, cl. 14, of the Constitution empowers Congress "to make Rules for the Government and Regulation of the land and naval Forces." It has been held that this grant empowers Congress to make rules governing this defined class without strict regard for certain constitutional guarantees applicable to citizens generally.² The inquiry here is whether Clause 14, properly interpreted in its constitutional context, empowers Congress to provide for military trials in non-capital cases of United States civilians employed overseas by the armed forces in peacetime. The Supreme Court's holding that Congress did not have the power to provide for such court-martial trials of military *dependents* charged with *capital* offenses 83 by implication declared unconstitutional one phrase of Article 2(11) of the Uniform Code of Military Justice, and that phrase only insofar as it relates to capital offenses. *United States v. Dial*, 9 U.S.C.M.A. 541, 26 C.M.R.

¹ 354 U.S. 1 (1957), *rehearing and reversing*, 351 U.S. 487 (1956), and *Kinsella v. Krueger*, 351 U.S. 470 (1956).

² *Dynes v. Hoover*, 61 U.S. (20 How.) 65 (1857); *Ex parte Reed*, 100 U.S. 13 (1879). Among those constitutional rights which Congress may deny to this defined class are trial by jury and venue requirements (Art. III, § 2, and amend. VI), indictment by grand jury (amend. V).

321 (1958).³ The majority here extends the scope of *Reid v. Covert* in two directions: first, to civilian employees (as distinguished from dependents), and second, to non-capital cases.

Judicial caution, always appropriate in dealing with such far reaching matters as this, is especially in order where, as here, the joint action of the Legislative and Executive Branches under scrutiny deals with the national defense and delicate matters of foreign policy.⁴ The presumptions of constitutionality should not be quickly cast aside merely because a closely connected but legally unrelated portion of the same statute has previously been declared unconstitutional.

Article 2 of the Uniform Code of Military Justice⁵ lists various categories of persons who are subject to military jurisdiction. Subsection (11) so classifies "persons serving with, employed by, or accompanying the armed forces outside the United States" *Reid v. Covert* invalidates

84 by implication only that part applying to "persons accompanying," but my colleagues find it impossible to divide subparagraph (11) so as to sustain the distinction between "persons accompanying" on the one hand and "persons serving with [or] employed by" on the other. *Reid v. Covert* itself, the single case on which they rely, furnishes one basis for this distinction.

³ The "persons accompanying" phrase of art. 2(11), UCMJ, 10 U.S.C. § 802(11) (Supp. V., 1958). The United States District Court of West Virginia, subsequent to the above opinion of the Court of Military Appeals, released Mrs. Dial on a writ of habeas corpus, declining to distinguish between capital and non-capital cases with respect to the constitutional power of Congress over wives of servicemen. *United States ex rel. Singleton v. Kinsella*, 164 F. Supp. 707 (S.D.W. Va. 1958).

⁴ "These powers ['to raise armies; to build and equip fleets; to prescribe rules for the government of both . . .'] ought to exist without limitation, because it is impossible to foresee or define the extent and variety of national exigencies, or . . . means which may be necessary to satisfy them. The circumstances which endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed." *THE FEDERALIST* No. 23, at 145 (Ford ed. 1898) (Hamilton) (Emphasis not added.).

⁵ 10 U.S.C. § 802 (Supp. V. 1958).

I

The opinion of Mr. Justice Black, in which he speaks for four members of the Court (himself, the Chief Justice and Justices Douglas and Brennan), is very carefully limited to "wives, children and other dependents of servicemen." (354 U.S. at 23.) It expressly recognizes "that there might be circumstances where a person could be 'in' the armed services for purposes of Clause 14 even though he had not been inducted into the military or did not wear a uniform." (354 U.S. at 23.)

Justice Black's opinion declares that military jurisdiction can never be extended to "civilians," but it scrupulously refrains from drawing a clear line of the boundary between civilians and persons "in" the armed forces. Although it explicitly rejects the argument that the Necessary and Proper Clause could justify extension of military jurisdiction "to any group of persons beyond that class described in Clause 14" (354 U.S. at 20-21), it avoids delineating that class with precision. Indeed, the very language quoted above clearly indicates that the class might well include civilian employees as distinguished from dependents, or at the least, some of them.

Mr. Justice Frankfurter, concurring separately, was unwilling to read Clause 14 in isolation from the Necessary and Proper Clause. Only by reading the two clauses together, he said, may there "be avoided a strangling literalness in construing a document that is not an enumeration of static rules but the living framework of government designed for an undefined future." (354 U.S. at 43.) Mr.

85 Justice Frankfurter was articulating the same warning we find in the FEDERALIST No. 23 dealing with congressional powers "to raise armies." The test he proposed for determining whether the Constitution permits trial of a given civilian for a given crime is whether that person was "so closely related to what Congress may allowably deem essential for the effective 'Government and Regulation of the land and naval Forces' that [he] may be subjected to court-martial jurisdiction" (354 U.S. at 44) for his particular offense. Justice Frankfurter's concurrence was accordingly limited to the position that Congress may not in peacetime provide for military trials of *civilian dependents* charged with *capital* offenses without

a grand jury indictment and trial by jury. He makes this "narrow delineation of the issue" (354 U.S. at 45) clear beyond any possible doubt.

Mr. Justice Harlan, in his separate concurrence, also disagreed with Justice Black's dictum that Clause 14 power "was intended to be unmodified by the Necessary and Proper Clause." (354 U.S. at 67.) He emphasizes the position, also taken by Mr. Justice Frankfurter, that special considerations apply in cases involving capital offenses. He warned that the Court should not unnecessarily foreclose its "future consideration of the broad questions involved in maintaining the effectiveness of . . . national [military] outposts" (354 U.S. at 77) by deciding more than was directly involved in the case before it.

The position of the majority of this court is that when the Supreme Court struck down that part of Article 2(11) relating to capital cases involving "persons accompanying the armed forces," it unavoidably struck down Article 2(11) in its entirety, and thereby destroyed all authority to try by courts-martial persons "serving with [or] employed by" the armed forces charged with non-capital offenses. Nothing held, or even intimated by the Supreme Court warrants this result, and familiar rules for judicial guidance dictate two courses which would lead to the result I urge: first, this case is readily distinguishable, on its facts, from *Reid v. Covert*; second, we should not hold non-severable a part of the statute which is in no way dependent on or logically related to that part invalidated by the Supreme Court.

The three opinions in *Reid v. Covert* indicate that there are two approaches which may be used to distinguish the present case from the one decided there. First, on the approach of Mr. Justice Black, I suggest that appellant may well be "in" the armed forces for the purposes of Clause 14 jurisdiction and that that Clause, considered in isolation, justifies military jurisdiction in this case. Second, on the approach suggested by the concurring opinions, I conclude that military jurisdiction is warranted here even if it be thought that appellant was not within the specific class delimited by Clause 14.² These conclusions are plainly consistent with the holding of *Reid*

v. *Covert*, unless we ignore the distinctions so carefully drawn there by all the opinions.

Even if the conclusion is ultimately reached that "persons serving with [or] employed by" may not be subjected to military jurisdiction, the reasoning and the route must be different. The problem of constitutional interpretation inescapably presented by this case cannot be side-stepped by citing *Reid v. Covert* as controlling. It will take a new or different step to reach the conclusion that the Constitution prohibits exercise of military jurisdiction in the case now before us.

II

In *Reid v. Covert* the Court considered historical precedent for court-martial jurisdiction over civilians and found that British constitutional history since the Revolution of 1689 and American history strongly compelled the result

that was reached.⁶ This same historical approach
87 supplies us with one solid criterion for distinguishing the present case from *Reid v. Covert*. Ever since 1689 military law has been regarded by English speaking people as an unwelcome but necessary abridgment of civil rights. The first British Mutiny Act (1689), after declaring that no man should be punished except by a judgment of his peers, proceeded: "Yet, nevertheless, it being requisite for retaining such Forces . . . in their Duty an exact discipline be observed."⁷ Despite the pervading desire evidenced here and elsewhere⁸ to place all possible limitations upon the jurisdiction of courts-martial, the British Articles of War in force at the time of our Revolution provided that

"All Suttlers and Retainers to a Camp, and all Persons whatsoever, *serving with* Our Armies in the Field, though no inlisted Soldiers, are to be subject to Orders

⁶ Justice Black's opinion, 354 U.S. at 23-35.

⁷ As reprinted in WINTHROP, *MILITARY LAW AND PRECEDENTS* 929 (2d ed., Reprint 1920) (hereinafter cited as WINTHROP).

⁸ See the various authorities cited by Mr. Justice Black, 354 U.S. at 24-28; see also the report of Parliamentary debates on the British Mutiny Act (1689) set out in 19 RAPIN, *HISTORY OF ENGLAND* 188-92 (5th ed. Tindal 1763).

according to the Rules and Discipline of War.”
(Emphasis added.)⁹

A substantially identical provision was enacted by the Continental Congress in 1775,¹⁰ was reenacted in 1776,¹¹ and again included in the first Articles of War enacted after the Constitution, in 1806.¹²

88 Although there is surely reasonable debate over the meaning of the phrase “in the field” as it is used in these articles, there can be no doubt that all of these statutes make allowance for persons “serving with” the armed forces while remaining silent concerning those “accompanying” the army. This is more than a mere verbal distinction. Although there is some slight authority for holding wives of soldiers subject to court-martial under these provisions,¹³ there is definite emphasis on the element of “serving.” The fact that two classes of employees—suttlers and retainers—were used surely must be regarded as significant. Whatever disagreement there may be over the precise construction of these articles, it cannot be disputed that, under certain circumstances, military court-martial jurisdiction over civilian employees of the armed forces was standard practice at the time the Constitution was adopted. Provision for such jurisdiction has been maintained in the statutes in some form ever since.¹⁴

This power has been repeatedly upheld as constitutional

⁹ British Articles of War of 1765, art. 23 section 14, reprinted in WINTHROP 941; the same provision is contained in the British Articles of War of 1774, art. 23, section 14, reprinted in DAVIS, *A TREATISE ON THE MILITARY LAW OF THE UNITED STATES* 593 (3d ed. 1915).

¹⁰ 2 J. CONT. CONG. 116 (1775)

¹¹ 5 J. CONT. CONG. 800 (1776), reprinted in WINTHROP 967.

¹² 2 Stat. 366, reprinted in WINTHROP 981.

¹³ See WINTHROP 99 n.94 and authorities cited there.

¹⁴ Articles of War of 1806, art. 60, 2 Stat. 366, reprinted in WINTHROP 981; Articles of War of 1874, art. 63, REV. STAT. § 1342, p. 236 (1875), reprinted in WINTHROP 991; Articles of War of 1916, art. 2(d), 39 Stat. 651; UCMJ, art. 2(11), 10 U.S.C. § 802(11) (Supp. V, 1958).

with respect to its exercise during wartime.¹⁵ The central issue here is whether its peacetime exercise is constitutional. Several times it has been held so by various courts under circumstances substantially similar to those in the present case.¹⁶ On the other hand, no case prior to *Reid v. Covert* has been cited or found upholding military jurisdiction over the wife or other dependent of a serviceman, either in peace or war. Indeed, it was not until 1916 that Congress expanded the class subject to courts-martial by adding thereto "persons accompanying" the armed forces.¹⁷ Even then it was not made clear that this phrase included dependents, and the cases arising under it have involved employees, not dependents.¹⁸ Without doubt military jurisdiction over essential civilian employees at overseas bases would be sustained in wartime. There remains unanswered whether courts can take judicial notice of the fact that what we call peacetime is, except for degree, much like the sporadic, limited, undeclared warfare with savage Indian tribes and bands a hundred years ago.¹⁹ Under the majority holding a civilian employee of the military on duty in Korea in the 1950-54 period, declared only to be an "emergency," would be immune from punishment for stealing military supplies,

¹⁵ *Perlstein v. United States*, 151 F.2d 167 (3d Cir. 1945), *cert. granted*, 327 U.S. 777, *dismissed as moot*, 328 U.S. 822 (1946); *Hines v. Mikell*, 259 Fed. 28 (4th Cir.), *cert. denied*, 250 U.S. 645 (1919); *Grewe v. France*, 75 F.Supp. 433 (E.D. Wis. 1948); *In re Be'ne*, 54 F.Supp. 252 (S.D. Ohio 1944); *McCune v. Kilpatrick*, 53 F.Supp. 80 (E.D. Va. 1943); *In re Di Bartolo*, 50 F.Supp. 929 (S.D.N.Y. 1943); *Ex parte Joehen*, 257 Fed. 200 (S.D. Tex. 1919); *Ex parte Falls*, 251 Fed. 415 (D.N.J. 1918); *Ex parte Gerlach*, 247 Fed. 616 (S.D.N.Y. 1917).

¹⁶ *Matter of Varney*, 141 F.Supp. 190 (S.D. Cal. 1956); *United States v. Wilson*, 9 U.S.M.C.A. 60, 25 C.M.R. 322 (1958); *United States v. Burney*, 6 U.S.C.M.A. 776, 21 C.M.R. 98 (1956).

¹⁷ Articles of War of 1916, art. 2(d) 39 Stat. 651.

¹⁸ *E.g.*, *Perlstein v. United States*, 151 F.2d 167 (3d Cir. 1945), *cert. granted*, 327 U.S. 777, *dismissed as moot*, 328 U.S. 822 (1946); *In re Di Bartolo*, 50 F.Supp. 929 (S.D.N.Y. 1943). For the legislative history of this addition, see S. REP. No. 130, 64th Cong., 1st Sess. Pertinent portions are reprinted in *In re Di Bartolo*, *supra* at 932-33.

¹⁹ *Cf.* *U.S. v. Wiese*, No. CC 488, National Archives; *U.S. v. Trader*, No. HH 882, National Archives; *U.S. v. Barnard*, No. HH 895, National Archives; *U.S. v. Ringsmer*, No. HH 880, National Archives.

except as the "civilian government" of South Korea would try him under its criminal code—if any.

The authority for military jurisdiction, with respect both to its wartime and peacetime exercise, rests on Article 1, § 8, cl. 14, read together with the Necessary and Proper Clause.²⁰ Constitutional authority has thus been found for military jurisdiction over civilian employees of the armed forces who are serving outside the United States. Appellant contends, however, that this jurisdiction can be justified only by the existence of a declared state of war.²¹ While such authority must be strictly limited and its exercise scrutinized, it seems to me that circumstances exist other than a state of declared war, which warrant its employment until and unless a workable substitute can be devised.

In the words of THE FEDERALIST, "the circumstances which endanger the safety of nations are infinite and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed."²² The circumstances which today endanger the safety of this and all free nations are utterly different in nature and degree from those which confronted the drafters of the Constitution. The unique perils we face could not be anticipated in the 1780's but the constitutional architects carefully recognized this and left the future reasonably free to deal with its own problems. Among the "unforeseeables" which they prophetically allowed for is the fact that while armies of that day depended chiefly on uniformed soldiers, today in what is technically "peace-
 91 time" there are roughly 25,000 civilian employees serving our armed forces at numerous military bases spread throughout the world. That military bases on this scale are maintained by us in peacetime is, in itself, a startling innovation since World War II. Yet the major-

²⁰ See, e.g., *Matter of Varney*, 141 F.Supp. 190 (S.D. Cal. 1956); *Ex parte Jochen*, 257 Fed. 200 (S.D. 1919); *United States v. Wilson*, 9 U.S.C.M.A. 60, 25 C.M.R. 322 (1958).

²¹ Brief for Appellant, p. 9.

²² THE FEDERALIST No. 23, at 145 (Ford ed. 1898) (Hamilton).

ity holds that Congress may not provide court-martial trial for these essential civilian employees at foreign bases.

This holding at once overlooks the changing world we live in, to which I have already alluded, and forges "constitutional shackles" on the power of Congress and the Executive to deal with present day realities. The "undeclared," "limited" and "cold wars" since 1950 have engaged more men than all the wars in which our country participated from our Revolution to World War I. Moreover it cannot be denied that many of the "persons serving with [or] employed by . . . the armed forces outside the United States" are more essential than the uniformed soldier; that a civilian electronics expert or chemical engineer may be more essential than some generals, where the function of the base is the maintenance of aircraft and readying atomic arms and ICBM's.

The majority opinion attempts to avoid the impact of all these hard and real considerations by relying on *Reid v. Covert*, but these very facts contribute to distinguishing the two cases. These, I am confident, were the considerations which impelled the Supreme Court there to emphasize the narrow scope of its holding. These, no doubt, were the factors that led Mr. Justice Harlan to inveigh against foreclosing "future consideration of the broad questions involved in maintaining the effectiveness of . . . national outposts."²³ Our present holding, if it stands, could have, and probably will have, a major impact on the effectiveness of our "national outposts" at a time when so-called limited warfare may be imminent in various parts of the world; at such a time, above all, none but the most imperative restraints should be imposed by the courts.

92 However expressed, the issue here is simple: it is the delicate problem of balancing important rights of citizens against the needs of maintaining efficient national security. In the narrow context of a capital offense by a wife of a soldier in *Reid v. Covert* the Court found the scales tipped in favor of the individual interest. No challenge to that holding is involved in here resolving the balance in favor of broad national interests. I believe further that the holding I suggest for this case should extend to all non-capital cases involving overseas civilian

²³ 354 U.S. at 77.

employees of the armed forces. The question should not be left open for further litigation on a case-by-case basis with the result that one employee would be amenable to military jurisdiction by virtue of a possibly more intimate connection with the services than appellant while another would not be. To do so would lead to unnecessary administrative as well as judicial chaos.²⁴ I do not reach the question of capital cases of those serving with or employed by the military.

IV

If there were a feasible means, reasonably available for dealing with this problem, Congress should be required to provide procedures for these civilian employees, securing for them indictment by grand jury and trial by jury. But in the absence of a feasible substitute, Clause 14 together with the Necessary and Proper Clause²⁵ seems to me to empower Congress to subject these employees to trial by court-martial. No such substitute is suggested by the majority and I am unable to find any substitute. Several alternatives come to mind as being possible, but none are practical or desirable. The six alternatives are (see footnotes for objections): (a) induct all employees into the service and place them in uniform regardless of training or pay rates; (b) leave trial for crimes committed abroad entirely in the hands of the foreign sovereign in whose territory the act occurred; (c) bring accused employees back to the United States for trial; (d) set up new Article III courts (either within or without the military establishment) to provide the constitutional procedures for overseas trials of U.S. civilians; (e) provide by employment contracts that these employees subject themselves to court-martial jurisdiction for trial of crimes committed outside the United States; (f) make

²⁴ See 71 HARV. L. REV. 149 (1957).

²⁵ In *Reid v. Covert* Mr. Justice Black, disagreeing with the majority of the Court, said we must read Art. I, § 8, cl. 14, in isolation, rather than with the Necessary and Proper Clause. Even conceding this, *arguendo*, the absence of a feasible substitute for overseas court-martial jurisdiction should be an important practical consideration when we undertake judicially to define the limits of the "armed forces." See text at pages 14-15, *supra*.

no attempt to punish these civilian employees for any crimes they might commit overseas, instead merely discharge them.²⁶

(a) This would not accomplish the desired result; it would not secure for these persons either by jury of indictment by grand jury. Furthermore, it is utterly impractical from the important standpoint of personnel management. Some of the skilled technicians probably command higher wages than generals; yet their jobs require them to work side by side with enlisted and non-commissioned personnel.

(b) Like the first suggestion, this also fails to guarantee the sought for constitutional rights. In some cases it might result in subjecting United States citizens to bizarre or "cruel and inhuman" punishments. In addition, if the employees were stationed in some barren area, not actually under the control of any government (*e.g.*, Antarctica) this alternative would not be available.

(c) This would tend to deprive the accused of the benefit of friendly witnesses. It would violate the fundamental principle that trial should be held where the crime occurred, a principle fought for in the Revolutionary War. In the DECLARATION OF INDEPENDENCE, one of the grievances listed charged the English with "transporting us beyond Seas to be tried for pretended offenses." See also Blumie, *The Place of Trial of Criminal Cases*, 41 MICH. L. REV. 59 (1944); Note, *Criminal Jurisdiction over Civilians Accompanying American Armed Forces Overseas*, 71 HARV. L. REV. 712, 717-18 (1958).

(d) This would collide with the sovereign rights of the country where the crime was allegedly committed. Under the present "Status of Force" agreements these countries have granted us the limited privilege of exercising court martial jurisdiction over our armed forces and persons serving with them. These agreements constitute a substantial concession won only after lengthy negotiation, and it is extremely unlikely that many countries would be willing to permit us to encroach further. See *Hearings on Status of the North Atlantic Treaty Organization, Armed Forces, and Military Headquarters Before the Senate Committee on Foreign Relations*, 83d Cong., 1st Sess. (1953); Note, *Criminal Jurisdiction over American Armed Forces Abroad*, 70 HARV. L. REV. 1043 (1957).

(e) There are serious doubts whether such a contract would be valid. Although all of the rights involved here may be waived under certain circumstances, the waiver must be surrounded with certain safeguards. See *Adams v. United States ex rel. McCann*, 317 U.S. 269 (1942); *Patton v. United States*, 281 U.S. 276 (1930). In *Adams v. United States ex rel. McCann*, *supra*, the Court upheld a waiver of trial by jury in the absence of counsel; three justices (Murphy, Black, and Douglas) dissented, and the majority said that "an accused, in the exercise of a free and intelligent choice, and with the considered approval of the court, may waive trial by jury." 317 U.S. at 275. (Emphasis added.) Here the suggested waiver (by contract) would be made without two of the safeguards the Supreme Court has said are necessary.

(f) Abdication of all legal restraint is unrealistic. It would prejudice the rights and interests of the whole people and of citizens in the overseas community to secure a few rights for a small number; it would tend to break down discipline and would tend to be highly prejudicial to national prestige.

94 The problem of finding an alternative to courts-
 martial for the trial of *capital* charges against
 95 civilian *dependents* was considered by the Supreme
 Court in *Reid v. Covert*.²⁷ That limited situation
 does not pose as acute a problem for the administration
 of discipline in the armed forces as does the absence of
 any practical jurisdiction over *employee* for *all* charges.
 As Mr. Justice Frankfurter pointed out,²⁸ the incidence of
 capital charges brought overseas against dependents has
 been so small since the adoption of the Uniform Code
 of Military Justice that it does not merit great considera-
 tion. The two-phase extension of *Reid v. Covert* adopted
 here by the majority at once intensifies and enlarges the
 problem of a substitute jurisdiction. Yet, as I have pointed
 out, there is no adequate substitute and my colleagues
 appear to acknowledge this for they do not even attempt
 to suggest one.

This case does not in any sense present the courts with
 military usurpation of civilian power. The military tri-
 bunals exercise jurisdiction only to the extent and pre-
 cisely on the terms fixed by Congress and the Executive—
 both elected representatives of the people. Together the
 Legislative and Executive branches can, at will, modify,
 revoke or exercise broad and effective supervisory powers
 over the manner in which this jurisdiction is used. I em-
 phasize this because it points up the restraint and caution
 judges, and more especially this court, ought to exercise
 in setting aside the carefully considered joint action of the
 two coordinate branches of government exercising power
 thought by most reasonable men to have existed for over
 a century and a half.²⁹ We now strike down such

²⁷ See 352 U.S. 901 (1956); Justice Frankfurter concurring, 354 U.S. at 47-49; Supplemental Brief on Rehearing for Appellant, pp. 40-63; Supplemental Brief on rehearing for Appellee, pp. 137-59.

²⁸ 354 U.S. at 47-48.

²⁹ Not controlling, but interesting, is the universal recognition of the UCMJ as the most enlightened military code in history and as affording the basic elements of fairness. This is far from unbridled military power over civilians; it is bridled, harnessed, and hobbled—as it should be—by explicit congressional acts, and subject to the scrutiny of the United States Court of Military Appeals, composed of civilians, and other United States courts via habeas corpus.

96 action in reliance on the minority views of the Supreme Court with full awareness that there is no other feasible means of dealing with law enforcement concerning civilians at our foreign bases. *Reid v. Covert* has been called an invitation to murder, but as Mr. Justice Frankfurter suggested, Americans at overseas bases tend to commit relatively few murders. The majority opinion here is an invitation to larceny and every other one of the vast array of crimes within the reach of human ingenuity. We are left only with a qualified hope that these offenders may be subject to dismissal from "public service" if the offense can be established. I am unable to join in this kind of judicial negativism which strikes down sound, historically supported legal action and leaves a vacuum which cannot be filled.

97

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1958

No. 14,304

UNITED STATES OF AMERICA, EX REL DOMINIC GUAGLIARDO,
Appellant,

v.

NEIL H. McELROY, Secretary of Defense, Department of
Defense, et al., *Appellees.*

Appeal from the United States District Court for the
District of Columbia.

Before: Edgerton, Chief Judge, and Fahy and Burger,
Circuit Judges.

Judgment—September 12, 1958

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof It is ordered and adjudged by this Court that the order of the District Court appealed from in this cause be, and it is hereby, reversed, and that

this cause be, and it is hereby, remanded to the District Court for further proceedings consistent with the opinion of this Court.

Dated: September 12, 1958.

Per Circuit Judge Fahy.

Separate dissenting opinion by Circuit Judge Burger.

98

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

(Title Omitted)

Order—Supplementary Dissenting Opinion—November 10, 1958

Before: Burger, Circuit Judge.

The Clerk is hereby ordered and directed to add the following sentence at the end of footnote 3 (page 13) to my dissenting opinion in the above-entitled case:

The United States District Court of West Virginia, subsequent to the above opinion of the Court of Military Appeals, released Mrs. Dial on a writ of habeas corpus, declining to distinguish between capital and non-capital cases with respect to the constitutional power of Congress over wives of servicemen. United States ex rel. Singleton v. Kinsella, 164 F. Supp. 707 (S.D. W.Va. 1958).

Dated: November 10, 1958.

100

CLERK'S CERTIFICATE
(Omitted in Printing)

101

SUPREME COURT OF THE UNITED STATES

No. 570, October Term, 1958

(Title Omitted)

Order Allowing Certiorari—February 24, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 725

BRUCE WILSON, PETITIONER,

vs.

MAJOR GENERAL JOHN F. BOHLENDER,
COMMANDER, FITZSIMMONS ARMY HOSPITAL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT.

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(File endorsement omitted)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

UNITED STATES OF AMERICA EX REL

BRUCE WILSON, Fitzsimmons Army Hospital,
Denver, Colorado, *Petitioner*

v.

MAJOR GENERAL JOHN F. BOHLANDER, Commander,
Fitzsimmons Army Hospital, Denver, Colorado, *Respondent*

Petition for Writ of Habeas Corpus—Filed Aug. 20, 1958

The petition of Bruce Wilson shows:

1. The petitioner, Bruce Wilson, was born 54 years ago at Red Bluff, California, and at all times has been and still is a citizen of the United States. At all times relevant hereto, he was a civilian employed as an auditor of the Comptroller Division of the Army, Berlin Command, and not a member of the Armed Forces of the United States.

2. The petitioner is currently held, pursuant to military orders and by direction of military authorities at the Fitzsimmons Army Hospital, Denver, Colorado, and under the jurisdiction of the United States.

3. Heretofore, purporting to act under the authority of Article 2 (11) of the Uniform Code of Military Justice (50 USC sec. 522 (11)), the United States Army caused petitioner to be tried by a general court-martial of the U. S. Army convened at Berlin, Germany, on charges of sodomy and of conduct prejudicial to good order and discipline in the Armed Forces in violation of Articles 125 and 134 of the Uniform Code of Military Justice (50 USC sec. 719 and 728.)

4. Petitioner was so tried and on or about 21 August 1956 was sentenced to ten years at hard labor which the Convening Authority reduced to five (5) years.

5. Since on or about 21 August 1956, the petitioner has at all times been detained and confined under the jurisdic-

tion of the U. S. Army; for a period of time at the Usareur Stockade, Mannheim, Germany; Fort Jay, Governor's Island, New York; Branch-United States Disciplinary Barracks, New Cumberland, Pennsylvania; Valley Forge Army Hospital, Pennsylvania; and is presently confined at Fitzsimmons Army Hospital, Denver, Colorado.

6. Petitioner's arrest, detention and confinement by the United States military authorities has at all times been and still is unlawful and in violation of the Constitution of the United States. As an American citizen and a civilian, your petitioner could not be constitutionally tried by court-martial. Only a Court constituted under Article III of the Constitution, giving the safeguards of the Bill of Rights, especially Amendments V and VI, has jurisdiction to try him.

2 7. The persons exercising custody and restraint of petitioner are subordinate to, and under the direction of, respondent.

8. A petition for a Writ of Habeas Corpus was filed in the United States District Court for the District of Columbia but was dismissed on grounds of lack of jurisdiction because the petitioner was not confined within the territorial limits of the District of Columbia. (Habeas Corpus #21-58).

WHEREFORE, petitioner prays that a Writ of Habeas Corpus be granted and issued, directed to respondent, commanding him to produce the body of petitioner before the Court at a time and place therein to be specified, then and there to receive and do what the Court shall order concerning the detention and restraint of petitioner, and that petitioner be ordered discharged from the detention and restraint aforesaid; and for such other relief as to the Court may seem just and proper.

ARTHUR JOHN KEEFFE
Arthur John Keeffe, Esq.
GEORGE P. NOUMAIR
George J. Noumair, Esq.

Attorneys for Petitioner

HOLLAND & HART

By JAY W. TRACEY, JR.
Jay W. Tracey, Jr.

Attorneys for Petitioner,
520 Equitable Building,
Denver 2, Colorado,
AMherst 6-1461.

United States of America }
District of Columbia } -ss
City of Washington }

Sworn to before me this 5th day of June, 1958.

BRUCE WILSON
Petitioner

MARY JO FREEHILL
Notary Public

(Seal)

My Commission expires Apr. 14, 1960.

STATE OF COLORADO }
COUNTY OF ADAMS }
FITZSIMONS ARMY HOSPITAL }

Sworn and subscribed to before me by BRUCE WILSON this
20th day of August, 1958.

GENELIA O'GARA
Notary Public

(Seal)

My Commission expires March 17, 1962.

3 STATE OF COLORADO }
COUNTY OF ADAMS } ss.
FITZSIMONS ARMY HOSPITAL }

I, BRUCE WILSON, being first duly sworn, say that I am the
Petitioner by whom the foregoing Petition is subscribed,
that I have read the same and that the facts set forth
therein are true to the best of my own knowledge and
belief.

BRUCE WILSON
Bruce Wilson

(Seal)

Notary Public

My Commission expires March 17, 1962.

4

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

v.

**Return of Respondent to Order to Show Cause—
Filed Aug. 25, 1958**

1. That said petitioner was serving with, employed by and accompanying the Armed Forces without the continental limits of the United States during the years 1955 and 1956.

2. That on August 21, 1956, said petitioner was charged and convicted of three acts of sodomy, in violation of Article 125, Uniform Code of Military Justice, 50 USC, Section 719; that he was further convicted of two charges of lewd and lascivious acts with persons under the age of

sixteen, in violation of Article 134, Uniform Code of Military Justice, 50 USC, Section 728; that he was further convicted of two charges of displaying lewd and filthy pictures to minors with intent to arouse their sexual desires, in violation of Article 134, Uniform Code of Military Justice, 50 USC, Section 728; that the General Court Martial sentenced the petitioner to confinement at hard labor for a period of ten years; that on August 23, 1956, the convening authority approved the conviction and reduced the sentence to five years at hard labor and directed that the petitioner be confined to the Branch United States Disciplinary Barracks, New Cumberland, Pennsylvania, pursuant to General Court Martial Order No. 16, Headquarters, Berlin Command, U. S. Army, a copy of which is hereto appended.

3. That the conviction was affirmed by the United States Court of Military Appeals on March 28, 1958—*United States v. Wilson*, 8, USMA 60, 25 CMR 322.

4. That on April 18, 1958, the petitioner was transported to Fitzsimons Army Hospital for purposes of hospitalization and treatment, pursuant to Special Order No. 77, a copy of which is hereto appended.

WHEREFORE, for the reasons hereinabove set forth, the respondent respectfully prays that the court discharge the order to show cause and dismiss the petition for said writ of habeas corpus.

JOHN S. PFEIFFER,
John S. Pfeiffer,
*Assistant United States Attorney
for the District of Colorado
Attorney for Respondent.*

JSP:fsm

General Court-Martial
Order Number 16

Headquarters
Berlin Command
APO 742, US Army
23 August 1956

Before a General Court-Martial which convened at Berlin, Germany, pursuant to paragraph 1, Special Orders Nr 147, this headquarters, dated 26 June 1956, was arraigned and tried:

GS-11 Bruce Wilson, Department of the Army civilian employee.

CHARGE I: Violation of the Uniform Code of Military Justice, Article 134

Specification 1: In that Bruce Wilson, a person serving with, employed by, and accompanying the armed forces without the continental limits of the United States in Berlin, Germany, did, at Berlin, Germany, during the month of December 1955, commit a lewd and lascivious act with Joseph R. Szocinski, a male under sixteen years of age, by placing Joseph R. Szocinski's penis in his mouth, with intent to gratify the sexual desires of the said Bruce Wilson.

Specification 2: In that Bruce Wilson, a person serving with, employed by, and accompanying the armed forces without the continental limits of the United States in Berlin, Germany, did, at Berlin, Germany, during the month of March or April 1956, commit a lewd and lascivious act with Charles F. Messer, Jr., a male under sixteen years of age, by placing Charles F. Messer, Jr's penis in his mouth, with intent to gratify the sexual desires of the said Bruce Wilson.

CHARGE II: Violation of the Uniform Code of Military Justice, Article 125

Specification 1: In that Bruce Wilson, a person serving with, employed by, and accompanying the armed forces without the continental limits of the United States in

Berlin, Germany, did, at Berlin, Germany, during the month of June 1956, commit sodomy with Private First Class Samuel W. Sloan.

Specification 2: In that Bruce Wilson, a person serving with, employed by, and accompanying the armed forces without the continental limits of the United States in Berlin, Germany, did, at Berlin, Germany, during the month of May 1956, commit sodomy with Private First Class William C. Frederick.

Specification 3: In that Bruce Wilson, a person serving with, employed by, and accompanying the armed forces without the continental limits of the United States in Berlin, Germany, did, at Berlin, Germany, during the month of June 1956, commit sodomy with Private-2 Marvin W. Warnack.

ADDITIONAL CHARGE: Violation of the Uniform Code of Military Justice, Article 134

Specification 1: In that Bruce Wilson, a person serving with, employed by, and accompanying the armed forces without the continental limits of the United States in Berlin, Germany, did, at Berlin, Germany, from on or about 21 April 1956 to on or about 20 June 1956, wrongfully and unlawfully show obscene, lewd and filthy pictures and photographs to Robert C. Vick, a minor, with the intent of arousing the passions and sexual desires of the said Robert C. Vick.

Specification 2: In that Bruce Wilson, a person serving with, employed by, and accompanying the armed forces without the continental limits of the United States in Berlin, Germany, did, at Berlin, Germany, from on or about 1 December 1955 to on or about 20 June 1956, wrongfully and unlawfully show obscene, lewd and filthy pictures and photographs to Ashton L. Norton, a minor, with the intent of arousing the passions and sexual desires of the said Ashton L. Norton.

7

PLEAS

To all Specifications and Charges: Guilty

FINDINGS

Of all the specifications and Charges: Guilty

SENTENCE

To be confined at hard labor for ten years. (No previous convictions considered.)

The sentence was adjudged on 21 August 1956.

ACTION

HEADQUARTERS

BERLIN COMMAND

(7781)

Office of the Commanding General

APO 742 US ARMY

23 August 1956

In the foregoing case of Bruce Wilson, a person serving with, employed by, and accompanying the armed forces without the continental limits of the United States in Berlin, Germany, only so much of the sentence as provides for confinement at hard labor for five years is approved. The record of trial is forwarded to The Judge Advocate General of the Army for review by a board of review. A United States penitentiary, reformatory, or other such institution is designated as the place of confinement. However, the prisoner will be temporarily confined in the Branch United States Disciplinary Barracks, New Cumberland, Pennsylvania, pending the designation of a Federal institution by the Attorney General. At such time, the prisoner will be committed to the designated Federal institution and the confinement served therein, or elsewhere as competent authority may direct.

s/ HUGH P. HARRIS

t/ Hugh P. Harris

Major General, USA

Commanding

For the Commander:

O. M. BARSANTI

Colonel, GS

Chief of Staff

Official:

E. M. GILROY

E. M. Gilroy

Lt. Col, AGC

Adjutant General

Distribution:

- 5—TAG, Dept of the Army, Wash 25, DC (Attn: AGPF)
- 1—CO, Branch United States Disciplinary Barracks,
New Cumberland, Pa.
- 6—CinC, USAREUR. (Attn: Mil Justice Sec. JA Div),
APO 403, US Army
- 1—CG, Berlin Command (7781), APO 742, US Army
- 30—SJA, Berlin Command (7781), APO 742, US Army
- 1—Finance Officer, Berlin Command (7781), APO 742,
US Army
- 2—AG Records, Berlin Command (7781), APO 742, US
Army
- 3—AG Pers, Berlin Command (7781), APO 742, US
Army
- 1—PM, Berlin Command (7781), APO 742, US Army
- 1—The Comptroller, Berlin Command (7781), APO 742,
US Army
- 1—Lt Col F X Bradley, 6th Inf Regt, APO 742, US
Army
- 1—Conf Officer, Berlin Command Prov Guardhouse,
APO 742, US Army
- 5—CO, USAREUR Military Prison, APO 166, US
Army
- 1—Bruce Wilson, GS 11 Dept of the Army Civ. Berlin
Command Prov Guardhouse, APO 742, US Army

8 Extract from Special Orders No. 77

For immediate delivery

NOTE: For explanation of symbols and abbreviations see
AR 320-50 w/C2.

HEADQUARTERS
VALLEY FORGE ARMY HOSPITAL
Phoenixville, Pennsylvania

EXTRACT

18 April 1958

Special Orders
Number 77

* * * * *

9 13. Par. 10 SO 75 this Hq'es pert to trf of BRUCE
WILSON (former DAC, non-military prisoner of the
Department of the Army) (AGO#A 40793) to Fitzsimons
AH Denver, Colo is amended to add: "*for further obsn.
trmt & dispo thereat.*" AUTH: ASMRO 19871 dtd 14
Apr 58.

* * * * *
For the Commander:

R. F. SCHALLER
Major, MSC
Adjutant

Official:

LEO A. GODLEWSKI
Leo A. Godlewski
CWO, W-2, USA
Asst Adjutant

Distribution: AA,BB,CC,DD,EE,GG,
Special Distribution: Ref par 8-1 cy Off Tng Br
Ref par 7-10 cy Sfe Bennett (del CO MHD)

10

General Court-Martial Orders No. 300

HEADQUARTERS

BRANCH UNITED STATES DISCIPLINARY BARRACKS
New Cumberland, Pennsylvania

General Court-Martial
Order Number 300

8 May 1958

In the general court-martial case of GS-11 BRUCE
WILSON, Branch United States Disciplinary Barracks, New
Cumberland, Pennsylvania (formerly a Department of the
Army Civilian employee), the sentence, as approved by
the convening authority, to confinement at hard labor for
five (5) years, adjudged 21 August 1956, as promulgated
in General Court-Martial Order Number 16, Headquarters,
Berlin Command (7781), APO 742, U. S. Army, dated 23
August 1956, has been affirmed pursuant to Article 66 and
67. The provisions of Article 71c having been complied
with, the sentence will be duly executed. A United States
Penitentiary, reformatory, or other such institution is

designated as the place of confinement. However, the prisoner will be temporarily confined in the Branch United States Disciplinary Barracks, New Cumberland, Pennsylvania, in accordance with the provisions of Paragraph 4b (4), AR 633-5, or elsewhere as competent authority may direct.

By Order of COLONEL SALLEE:

Official:

WALTER F. JUNKINS
Captain, MPC
Adjutant

G. S. BREWER
CWO, W-2 USA
Asst Adjutant
(CM 392423)

Distribution:
(Par 9f, GAR 22-10)

Signature
Date Noted

11

Extract from Special Orders No. 80

HEADQUARTERS

BRANCH UNITED STATES DISCIPLINARY BARRACKS
New Cumberland, Pennsylvania

Special Orders
Number 80

8 May 1958

EXTRACT

2. The design place of conf in case of Prisoner BRUCE WILSON, RN25818 (DA Civ), presently abs sk Fitzsimmons Army Hosp Denver, Colo., is changed from Br USDB, New Cumberland, Pa to Br USDB, Lompoc, Cal off 12 May 58. AUTH: AR 633-5 and Msg PHGK-S, PHG DA dtd 5 May 58.

For the Commandant:

WALTER F. JUNKINS
Captain, MPC
Adjutant

Official:

G. S. BREWER
CWO, W-2 USA
Asst Adjutant

12

**Petitioner's Exhibit 1
Accused's Copy**

13

Extract from Special Orders No. 36

HEADQUARTERS

HEADQUARTERS AREA COMMAND

**United States Army Garrison, Headquarters Area,
Germany APO 333, US Army**

**Special Orders
Number 36**

18 February 1958

EXTRACT

1. PAC MCM 1951, par 97d, Ltr JAGJ 1954/4164, 20 Apr 1954 and in conformance with par 4b, AR 618-95, 22 Oct 1957, in the General Court Martial case of GS-11 Bruce Wilson, Department of the Army Civilian employee promulgated in GCMO Number 16, 23 Aug 1956, Headquarters Berlin Command, APO 742 and corrected by GCMO Number 19, 30 Aug 1956, Headquarters Berlin Command, APO 742, the previously designated temporary place of confinement, namely USAREUR Stockade, Mannheim, Germany, is changed and the prisoner will be confined in the US Disciplinary Barracks, New Cumberland, Pennsylvania or elsewhere as competent authority may direct, pending completion of appellate review.

For the Commander:

JAMES A. PARKER
Major, AGC
Adjutant

Official:

C. R. LUCAS
C. R. Lucas
Major, Arty
Asst. Adjutant

Distribution:

- 1—TAG, DA, Wash 25, D.C., Attn: AGPF
- 2—TPMG, DA Wash 25, D.C.
- 25—JA Div HACOM (Includes 10 cys for TJAG, DA Wash 25, DC)

- 1—Bruce Wilson, USAREUR Stockade, APO 166, US Army
- 25—Confinement Officer, USAREUR Stockade, APO 166, US Army
- 1—JA Div. Hq. USAREUR, APO 403, US Army
- 1—HACOM Fin & Acctg Office, APO 333, US Army
- 5—CG, Berlin Command, APO 742, US Army, Attn: SJA
- 2—Central Files, HACOM
- 2—Central Finance & Acctg Office, USAREUR, APO 403, US Army
- 2—HACOM Civilian Personnel Division

14 **General Court-Martial Orders No. 19**

Corrected Copy
General Court-Martial
Order Number 19

Headquarters
Berlin Command (7781)
APO 742, US Army
30 August 1956

In the general court-martial case of GS-11 Bruce Wilson, Department of the Army civilian employee, promulgated in General Court-Martial Order Nr. 16, this headquarters, dated 23 August 1956, the place of confinement designated as a United States penitentiary, reformatory, or other such institution, is redesignated as the *United States Army, Europe, Stockade, Mannheim, Germany*, pending completion of appellate review.

For the Commander:

(SEAL)

O. M. BARSANTI
Colonel, GS
Chief of Staff

Official:

E. M. GILROY
E. M. Gilroy
Lt Col, AGC
Adjutant General

Distribution:

- 5—TAG, Dept of the Army, Wash 25, DC (Attn: AGPF)
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- 30—SJA, Berlin Command (7781), APO 742, US Army
- 1—Finance Officer, Berlin Command (7781), APO 742, US Army
- 2—AG Records, Berlin Command (7781), APO 742, US Army
- 3—AG Pers, Berlin Command (7781), APO 742, US Army
- 1—PM, Berlin Command (7781), APO 742, US Army
- 1—The Comptroller, Berlin Command (7781), APO 742, US Army
- 1—Lt Col F X Bradley, 6th Inf Regt, APO 742, US Army
- 1—Confinement Officer, Berlin Command Provisional Guardhouse, APO 742, US Army
- 5—CO, USAREUR Stockade, APO 166, US Army
- 1—Bruce Wilson, GS-11 Dept of the Army Civ, USAREUR Stockade, APO 166, US Army

15

General Court-Martial Orders No. 19

General Court-Martial

Order Number 19

Headquarters
 Berlin Command (7781)
 APO 742, US Army
 30 August 1956

In the general court-martial case of GS-11 Bruce Wilson, Department of the Army civilian employee, promulgated in General Court-Martial Order Nr. 16, this headquarters, dated 23 August 1956, the place of confinement designated as a United States penitentiary, reformatory, or other such institution, is redesignated as the Branch

United States Disciplinary Barracks, New Cumberland,
Pennsylvania, pending completion of appellate review.

For the Commander:

(SEAL)

O. M. BARSANTI
Colonel, GS
Chief of Staff

Official:

E. M. GILROY
E. M. Gilroy
Lt Col, AGC
Adjutant General

Distribution:

- 5—TAG, Dept of the Army, Wash 25, DC (Attn: AGPF)
- 1—CO, Branch United States Disciplinary Barracks,
New Cumberland, Pa.
- 6—CinC, USAREUR (Attn: Mil Justice Sec, JA Div),
APO 403, US Army
- 1—CG, Berlin Command (7781), APO 742, US Army
- 30—SJA, Berlin Command (7781), APO 742, US Army
- 1—Finance Officer, Berlin Command (7781), APO 742,
US Army
- 2—AG Records, Berlin Command (7781), APO 742, US
Army
- 3—AG Pers, Berlin Command (7781), APO 742, US
Army
- 1—PM, Berlin Command (7781), APO 742, US Army
- 1—The Comptroller, Berlin Command (7781), APO 742,
US Army
- 1—Lt Col F. X. Bradley, 6th Inf Regt, APO 742, US
Army
- 1—Conf Officer, Berlin Command Prov Guardhouse,
APO 742, US Army
- 5—CO, USAREUR Military Prison, APO 166, US
Army
- 1—Bruce Wilson, GS-11 Dept of the Army Civ,
USAREUR Military Prison, APO 166, US Army

16

16

Extract from Special Orders No. 147

Proceedings of a General Court-Martial which met (at) Berlin, Germany, at 0935 hours, 21 August 1956, pursuant to the following orders:

HEADQUARTERS
BERLIN COMMAND
(7781)
APO 742 US Army

Special Orders
Number 147

26 June 1956

EXTRACT

1. Pursuant to authority contained in Section I, General Orders 102 Department of the Army, 21 Nov 52, a general court-martial is hereby ordered to convene at Berlin, Germany, at 0800 hours on 27 Jun 56, or as soon thereafter as practicable, for the trial of such persons as may properly be brought before it. The court will be constituted as follows:

* * * * *

For the Commander:

(SEAL)

J. M. WILLIAMSON
Colonel, GS
Act Chief of Staff

Official:

E. M. GILROY
Lt Col, AGC
Adjutant General

17 Para 1, SO 147, Hq Berlin Command (7781)

Distr:

25—SJA Div

1—Ea Member

1—CO, Hq & Hq Co Berlin Sta Com (7781)

1—CO, Sig Co Berlin Sta Com (7781)

1—CO, Svc Co Berlin Sta Com (7781)

5—CO, 279 Sta Hosp

10—CO, 6th Inf Regt

30—AG (10—Mil Pers

20—Orders)

PERSONS PRESENT

Maj Paul G. Tobin
 Lt Col Francis X. Bradley
 Lt Col Horace L. Jennerson
 Lt Col Robert O. English
 Lt Col Thomas J. Cleary, Jr.
 Lt Col Theodore Kafter
 Lt Col Louis R. Buckner
 Maj Harold L. Ramsey
 1st Lt Zane E. Finkelstein
 Capt Melburn N. Washburn

PERSONS ABSENT

Maj Hasty W. Riddle
 Maj Edward J. Maltese
 1st Lt Raymond Lesinski
 2d Lt Robert H. Daine
 1st Lt Aldon L. Carson
 1st Lt John E. Day, Jr.

The following named accused was present:

BRUCE WILSON, AGO A-407 943, GS-11, Department
 of the Army Civilian, Comptroller Division, Berlin
 Command (7781)

The appointed reporter, Jean P. Webb was sworn.

19 TC: The legal qualifications of all members of the prosecution are correctly stated in the appointing orders.

No member of the prosecution named in the appointing orders has acted as investigating officer, law officer, court member, or as a member of the defense in this case, or as counsel for the accused at a pretrial investigation or other proceedings involving the same general matter.

By whom will the accused be defended?

DC: The accused will be defended by Captain Washburn as associate counsel; he expressly consents to the absence of Lieutenants Carson and Day; and introduces as individual counsel Dr. Arthur Brandt who is a member of

the Bar of the State of Massachusetts and the Federal Bar of New York.

TC: Will counsel representing the accused state whether the legal qualifications of the appointed members of the defense are other than as stated in the appointing orders and will individual counsel state whether he has been certified as counsel by an appropriate Judge Advocate General?

DC: The qualifications of appointed members of the defense are correctly stated and the individual counsel is not certified.

TC: Has any member of the defense, including individual counsel, acted as the accuser, a member of the prosecution, investigating officer, law officer, or member of the court in this case?

DC: No member has so acted.

LO: It appears that counsel for both sides have the requisite qualifications.

Proceed to convene the court.

TC: The court will be sworn.

The members of the court, the law officer, and the personnel of the prosecution and defense were sworn.

LO: The court is now convened.

TC: The general nature of the charges in this case is two specifications of lewd and lascivious acts with males under sixteen years of age and three acts of sodomy with enlisted men in the Berlin Garrison, in violation of Articles 134 and 125 respectively; and of the Additional Charge two specifications of displaying lewd and obscene photographs to two different minors, with intent to arouse the passion of the minors, in violation of Article 134 of the

Uniform Code of Military Justice. The charges
20 were preferred by Lieutenant Colonel Hammonds, and the additional charge was preferred by Chief Warrant Officer William J. Autry; forwarded with recommendations as to disposition by Lieutenant Colonel Quinlan; and investigated by Major Bell. Neither the law officer nor any member of the court will be a witness for the prosecution.

The records of this case disclose no grounds for challenge.

If any member of the court or the law officer is aware of any facts which he believes may be a ground for challenge

by either side against him, he should now state such facts.

LO: Apparently there are none.

TC: The prosecution has no challenges for cause and the prosecutive has no peremptory challenge.

Does the accused desire to challenge any member of the court or the law officer for cause?

DC: He does not.

TC: Does the accused wish to exercise his right to one peremptory challenge against any member?

DC: He does not.

21 CHARGE I. Violation of the Uniform Code of Military Justice, Article 134

Specification 1: In that Bruce Wilson, a person serving with, employed by, and accompanying the armed forces without the continental limits of the United States in Berlin, Germany, did, at Berlin, Germany, during the month of December 1955, commit a lewd and lascivious act with Joseph R. Szocinski, a male under sixteen years of age, by placing Joseph R. Szocinski's penis in his mouth, with intent to gratify the sexual desires of the said Bruce Wilson.

Specification 2: In that Bruce Wilson, a person serving with, employed by, and accompanying the armed forces without the continental limits of the United States in Berlin, Germany, did, at Berlin, Germany, during the month of March or April 1956, commit a lewd and lascivious act with Charles F. Messer, Jr., a male under sixteen years of age, by placing Charles F. Messer, Jr's penis in his mouth, with intent to gratify the sexual desires of the said Bruce Wilson.

CHARGE II. Violation of the Uniform Code of Military Justice, Article 125

Specification 1: In that Bruce Wilson, a person serving with, employed by, and accompanying the armed forces without the continental limits of the United States in Berlin, Germany, did, at Berlin, Germany, during the month of June 1956, commit sodomy with Private First Class Samuel W. Sloan.

Specification 2: In that Bruce Wilsen, a person serving with, employed by, and accompanying the armed forces

without the continental limits of the United States in Berlin, Germany, did, at Berlin, Germany, during the month of May 1956, commit sodomy with Private First Class William C. Frederick.

Specification 3: In that Bruce Wilson, a person serving with, employed by, and accompanying the armed forces without the continental limits of the United States in Berlin Germany, did, at Berlin, Germany, during the month of June 1956, commit sodomy with Private-2 Marvin W. Warnack.

22 Typed Signature of Accuser—Vernon Hammonds
 Rank—Lt Col, MPC
 Organization—Provost Marshal Berlin Command (7781)

AFFIDAVIT

Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above-named accuser this 25 day of June, 1956, and signed the foregoing charges and specifications under oath that he is a person subject to the Uniform Code of Military Justice, and that he either has personal knowledge of or has investigated the matters set forth therein, and that the same are true in fact, to the best of his knowledge and belief.

E F Starr
 (Type signature)

*Officer administering oath must
 be a commissioned officer.*

Major, AGC, Adjutant General
 Division Berlin Command (7781)
 (Rank and organization of
 officer administering oath)

Assistant Adjutant General
 (Official character, as Adjutant,
 Summary Court, etc. See para-
 graph 29e, MCM, 1951, and
 articles 30a and 136.)

1st INDORSEMENT

Headquarters Berlin Command (7781)

(Designation of command of convening authority)

Berlin, German

(Place)

3 July 1956

(Date)

Referred for trial to the general court-martial appointed by paragraph 1, Special Orders No. 147, Headquarters Berlin Command, 26 June 1956, subject to the following instructions: To be tried with the additional charges, dated 27 June 1956

For the Commander:

(Command or order)

FRANCIS HUME

Capt, AGC Asst Adj Gen

(Typed signature, rank, and official capacity of officer signing)

23 Additional Charge: Violation of the Uniform Code of Military Justice 434

Specification 1: In that Bruce Wilson, a person serving with, employed by, and accompanying the armed forces without the continental limits of the United States in Berlin, Germany, did, at Berlin, Germany, from on or about 21 April 1956 to on or about 20 June 1956, wrongfully and unlawfully show obscene, lewd and filthy pictures and photographs to Robert C. Vick, a minor, with the intent of arousing the passions and sexual desires of the said Robert C. Vick.

Specification 2: In that Bruce Wilson, a person serving with, employed by, and accompanying the armed forces without the continental limits of the United States in Berlin, Germany, did, at Berlin, Germany, from on or about 1 December 1955 to on or about 20 June 1956, wrongfully and unlawfully show obscene, lewd and filthy pictures and photographs to Ashton L. Norton, a minor, with

the intent of arousing the passions and sexual desires of the said Ashton L. Norton.

24 Typed Signature of Accuser—William J. Autry
 Rank—CWO

Organization—11th MP Det (C1)

AFFIDAVIT

Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above-named accuser this 27 day of June, 1956, and signed the foregoing charges and specifications under oath that he is a person subject to the Uniform Code of Military Justice, and that he either has personal knowledge of or has investigated the matters set forth therein, and that the same are true in fact, to the best of his knowledge and belief.

E F Starr

(Typed signature)

*Officer administering oath must
 be a commissioned officer.*

E. F. STARR,

Major, Hq Berlin Command

(Rank and organization of officer
 administering oath)

Assistant Adjutant General

(Official character, as Adjutant,
 Summary Court, etc. See para-
 graph 29a, MCM, 1951, and
 articles 30a and 136.)

1st INDORSEMENT

Headquarters Berlin Command (7781)

(Designation of command of convening authority)

Berlin, Germany

(Place)

3 July 1956

(date)

Referred for trial to the general court-martial appointed by Special Orders No. 147, Headquarters Berlin Command, 26 June 1956, subject to the following instructions: To be tried with the original charges, dated 25 June 1956.

For the Commander:

(Command or order)

FRANCIS HUME,

Capt, AGC Asst Adj Gen

(Typed signature, rank,
and official capacity of officer
signing)

25 TC: With the consent of the accused I shall omit the reading of the charges, a copy of which is before each member of the court, the law officer, and the accused. The charges are signed by Lieutenant Colonel Hammonds and the additional charge is signed by Chief Warrant Officer William J. Autry, persons subject to the code, as accusers; are properly sworn to before an officer of the armed forces authorized to administer oaths; and are properly referred to this court for trial by Major General Harris, the convening authority. The charges and specifications and the additional charge and its specifications, the names and descriptions of the accusers, their affidavits, and the reference for trial will be copied verbatim into the record.

DC: The accused consents.

LO: The reading of the charges may be omitted. The charges and the additional charge were served on the accused by me on 3 July 1956.

Mr. Wilson, how do you plead?

Before receiving your pleas, I advise you that any motions to dismiss any charge or to grant other relief should be made at this time.

DC: Before entering a plea the defense requests a hearing with the law officer outside the hearing of the court.

LO: Without asking the nature of the request or the reason for the request—

IDC: The objection will be lack of jurisdiction.

LO: With the indulgence of the court I will hear, in the absence of the court, your arguments.

President: The court will be closed.

The court recessed at 0945 hours, 21 August 1956.

The court opened at 1020 hours, 21 August 1956.

President: The court will come to order.

TC: Let the record reflect that all parties to the proceedings who were present at the time the court recessed are again present in court.

LO: Proceed.

TC: Mr. Wilson, do you have other motions to make?

DC: He does not.

26 TC: Mr. Wilson, how do you plead?

IDC: On behalf of the accused the defense wishes to enter a plea of guilty as charged.

LO: Mr. Wilson, you have pleaded guilty to all Specifications and Charges. By so doing, you have admitted every act and every element of the offenses charged. Your plea subjects you to a finding of guilty without further proof of the offenses charged, and in that event you may be sentenced by the court to the maximum punishment authorized for the offenses. You are legally entitled to plead not guilty and place the burden on the prosecution of proving your guilt of the offenses. Your plea will not be accepted unless you understand the meaning and effect of that plea. Do you understand what I am talking about?

Accused: Yes sir.

LO: And understanding this, do you persist in your plea of guilty?

Accused: Yes sir.

TC: The prosecution has no legal authorities to present to the court.

Does the defense desire to present legal authorities at this time?

DC: The defense does not.

TC: Prosecution has no opening statement and in light of the plea of the accused the prosecution will present no evidence.

The prosecution rests.

DC: The defense has no opening statement.

The accused has been advised of his right to testify on the merits of the case and has elected to remain silent. Would the law officer care to further advise him?

LO: Yes, I would like to advise the accused of his testimonial rights on the merits.

Mr. Wilson, as the accused in this case you have these rights:

First, you may be sworn and take the stand as a witness. If you do that, whatever you say will be considered and weighed as evidence by the court just as is the testimony of other witnesses, and you may be cross-examined on your testimony by the trial counsel and the court. If your

27 testimony should concern less than all of the offenses charged against you and you do not desire to or do not testify concerning the others, then you may be questioned about the whole subject of the offenses concerning which you do testify but you will not be questioned about any offenses concerning which you do not testify.

Secondly, you may, if you wish, elect to remain silent, that is say nothing at all. If you do this, and you may if you wish, the fact that you do not take the witness stand will not count against you in any way with the court. It will not be considered as an admission that you are guilty, nor can it be commented upon by the trial counsel when addressing the court.

Do you understand what I have said?

Accused: Yes sir.

LO: All right then, I want you to again talk over your decision with your counsel and then tell the court what you desire to do.

Accused: Sir, I wish to remain silent.

LO: All right.

DC: Defense rests.

TC: The prosecution has no farther evidence to offer. Does the defense have any further evidence to offer?

DC: The defense has nothing further.

LO: Mr. Wilson's plea subjects him to a finding of guilty without further proof. With your permission the court will be closed.

President: Does any member of the court have any requests for further instructions from the law officer?

Lt. Col. Cleary: I would like to ask a question.

LO: Yes sir.

Lt. Col. Cleary: Is it our duty now to rule upon a plea of guilty or not guilty despite the acceptance?

LO: That is correct, sir. You must find—you close and vote on your findings of guilty or not guilty.

President: Any other questions?

The court will be closed.

28 The court closed at 1025 hours, 21 August 1956.

The court opened at 1035 hours, 21 August 1956.

President: The court will come to order.

TC: Let the record reflect that all parties to the proceedings who were present at the time the court closed are again present in court.

President: Bruce Wilson, it is my duty as president of this court to inform you that the court in closed session and upon secret written ballot, two-thirds of the members present at the time the vote was taken concurring in each finding of guilty, finds you:

Of all the Specifications and Charges: Guilty

LO: The court will now hear the personal data concerning the accused shown on the charge sheet, and will receive evidence of previous convictions, if any.

TC: Page 1 of the charge sheet discloses the following information concerning the accused:

Place: Berlin Germany Date: 25 June 1956

Accused: Wilson, Bruce (NMI)

Service Number: AGO A-407 943

Grade: GS 11, Department of the Army Civilian

Organization and Armed Force: Comptroller Division
Berlin Command (7781)

(employed by Department of the Army)

Date of Birth: 18 March 1904

Contribution to Family or Quarters Allowance: N/A

Pay Per Annum: Basic—\$6,820.00; Sea or Foreign Duty—

Total—\$6,820.00

Record of Service

Initial Date of Current Service: N/A

Term of Current Service:—

Prior Service: Employed as Department of the Army
Civilian 9 years, 5 months.

Data As To Restraint

Nature of any Restraint of Accused: Confinement

Date: 22 June 1956

Location: Confinement Ward, US Army Hospital, Berlin,
Germany

TC: Are the data as read correct?

DC: They are.

TC: Prosecution has no evidence of previous convictions.

29 LO: Mr. Wilson, you are advised that you may now present evidence in extenuation or mitigation of the offenses of which you stand convicted. You may, if you wish, testify under oath as to such matters, or remain silent, in which case the court will not draw any inferences from your silence. In addition, you may, if you wish, make an unsworn statement in mitigation or extenuation of the offenses of which you stand convicted. This unsworn statement is not evidence and you cannot be cross-examined upon it, but the prosecution may offer evidence to rebut anything contained in the statement. The statement may be oral or in writing, or both. You may make it yourself or it may be made by your counsel, or both of you. Consult with your counsel now and advise the court as to your desire.

Accused: Sir, I wish to remain silent. My counsel will present the matter for me.

LO: All right.

IDC: With the permission of the court I would like to submit in evidence three documents which will be marked Defense Exhibits A, B, and C.

LO: Do you wish to introduce all of these at one time or one at a time?

IDC: Is there any objection if I read the last one first?

LO: One moment, please, Doctor. Will you please present them to the reporter and have her mark them and then pass them to me?

IDC: O.K. Fine. They are A, B, C.

LO: Will you mark this Defense Exhibit A for Identification?

The document referred to was marked Defense Exhibit A for Identification.

LO: And this one Defense Exhibit B for Identification?

The document referred to was marked Defense Exhibit B for Identification.

LO: And Defense Exhibit C for Identification.

The document referred to was marked Defense Exhibit C for Identification.

LO: Does the prosecution have any objection to these Exhibits?

TC: No objection.

30 LO: Defense Exhibits A, B, and C for Identification will be received in evidence as Defense Exhibit A, Defense Exhibit B, and Defense Exhibit C, respectively.

The documents marked Defense Exhibit A for Identification, Defense Exhibit B for Identification, and Defense Exhibit C for Identification, were admitted in evidence and marked Defense Exhibit A, Defense Exhibit B, and Defense Exhibit C, respectively.

LO: You may now read them.

Individual counsel read Defense Exhibits A, B, and C to the court.

DC: Will the reporter mark these documents Defense Exhibits D and E for Identification?

The documents referred to were marked Defense Exhibit D for Identification and Defense Exhibit E for Identification.

DC: Defense Exhibit D for Identification which is the stipulated testimony of Dr. Werner Jaffe, and Defense Exhibit E for Identification which is the stipulated testimony of Captain H. M. Bertram, are offered in evidence as Defense Exhibit D and Defense Exhibit E.

TC: No objection.

LO: Mr. Wilson, I have here two documents headed "Stipulation", upon which there are the signatures of your counsel, the trial counsel, and one purporting to be your own. You don't have to consent to any stipulation and if you do not care to consent then we must bring in

proof of the things stipulated to. Knowing this, do you agree to these stipulations?

Accused: I have no objection to the stipulation, sir.

LO: Do you enter into the stipulations of your own free will?

Accused: Yes sir.

LO: Defense Exhibits D and E for Identification will be received in evidence as Defense Exhibits D and E.

The documents marked Defense Exhibit D for Identification and Defense Exhibit E for Identification were admitted in evidence and marked Defense Exhibit D and Defense Exhibit E, respectively.

DC: Have I permission to read them to the court, sir?

LO: You have.

Defense counsel read Defense Exhibit D and Defense Exhibit E to the court.

31 DC: Defense requests a five minute recess.

President: The court will recess for five minutes.

The court recessed at 1050 hours, 21 August 1956.

The court opened at 1055 hours, 21 August 1956.

President: The court will come to order.

TC: Let the record indicate that all parties to the proceedings who were present at the time the court recessed are again present in court.

LO: Proceed.

IDC: With the permission of the court I would like now, on behalf of the accused, to present to the court those factors which the defense considers important with regard to the problem of extenuating and mitigating circumstances. After the accused has pleaded guilty as specified it is now our duty to find which sentence he should have, how the punishment should be, and in fulfilling this duty we shall have to consider everything as far as this trial was able to disclose, those factors which are in his favor but naturally also those which are to his disadvantage.

The accused is a man of fifty-two years of age. No doubt he has been in the employment of the Army for many years. No doubt—I think I can say that here although the discussion of the problem of jurisdiction has taken place in a closed-session but nevertheless I think I am allowed to say that the accused voluntarily has resigned his position with the Army effective yesterday. He did

so because he felt that in view of the very grave charges brought against him he does not want to be a burden to the Army any more, and he does not want, whatever the outcome of this trial, to be a disgrace to the Army. I need not discuss at this time the legal repercussions of such resignation but I might say that I consider this a good gesture on the part of my client. It shows that he has not lost his sense of responsibility and it shows also that he does want to do everything he can to bring this trial to an end whereby no unnecessary examinations will take place and whereby finally, according to the offenses and in consideration of the factors which are in his favor, the sentence will be meted out.

There are factors which, in my opinion, are strongly in favor of the accused. His background and his past work have been considered by his superiors as of excellent character. This is the first time that this man of fifty-two years of age has ever been charged in any court with any offense. Having been retained as a civilian counsel I felt from the beginning and more and more of my working for him as an attorney I could not help feeling a strong sense of sympathy. I realized soon that the kind of offenses he has been charged with were not caused by a criminal disposition, have not been caused by a lack of responsibility towards society, I realized too that here a man, for certain reasons which were beyond his control, had been committing certain acts in the sexual field which are no doubt forbidden under the law but, nevertheless, deserve some human understanding. He was not a man who has committed any act, even in his capacity as an employee of the Army, that could be considered a disgrace to the Army; there was no act of violence; there was nothing which so often and unfortunately we are facing in these days and which form the background of a trial, it was strictly in the field of abnormal sexual relations that these offenses should have been and under his plea of guilty had been committed by the accused. The penalties, the maximum penalties under the law are very harsh. I do not think personally, and I may be allowed to say this as a civilian attorney, I do not think that they actually are in conformity with the measure of criminality, with the criminal intent which is al-

ways inherent in these kinds of cases. I may be allowed to say that we know that actually these things take place much more often, much more frequently, than society may be apt to admit, and we must say in all honesty and frankly that if all the cases of homosexual behavior which are really taking place would be tried in court, I do not think that the time of the court will be sufficient to have all these cases tried and brought to them.

In this particular case the accused is being charged with some offenses with men and some with young men. He admits these charges. I would like to mention here that not one of the persons concerned has ever brought any charge against him; they would not have complained at all; it was just due to the fact that everything which has taken place in the apartment there of the accused was a matter of voluntary acting, never of force, never of using any bad means, but it was actually a matter of voluntarily subjecting to these kinds of offenses. I tried, doing my duty as defense counsel with the able cooperation of Captain Washburn, we tried to find out naturally how this all came about, and I can only say that here is a man standing before you who never had any love in life, who never experienced any warm affection as most of us do, he never was married, he never had actually a loving woman, and, finally, after certain experiences he found himself in the Maritime Service and as it so happens, being on the high seas for many, many months, he experienced a kind of a love with a man, an officer on his ship, and there it happened into the life of a man so far apparently normal brought suddenly in a new experience, a kind of a friendship of intimate character with another man. You see suddenly a man who not only entertained—had the thought but also homosexual inclinations—a fact which will explain and can only explain the present course his life has taken. As I said before this man unfortunately never had any real love and finally he turned to the only man who could, in a way, give him some kind or some substitute of love. It explains also his whole way, it explains his kind of affection. It is true what the psychiatrist said about him—it is absolutely true that this man when he talks of any kind of love in his life he only

33 meant the three dogs and never a human being; no

woman was ever able to give him a kind of love and not even the men he had connections with were able to do so as we sometimes find in life. The dogs—two of them died recently and only one is left—meant everything to him and I was amazed at the affection this man suddenly was able to show when he talked about the animals but never when he talked about human beings of both sexes. I think instead of trying to analyze his life and to analyze the career which finally led to these offenses, instead of trying to do this I can simply mention the fact that both psychiatrists, Doctor Jaffe and Captain Bertram, concurred in the opinion that here is not only a man who is to be considered a psychotic character, a man of strong psychopathic traits, but definitely to be considered a psychopathic personality who is on the borderline of schizophrenia. Well now, Mr. President and members of the court, we are not psychiatrists, we can only take on the face of it what the psychiatrist tells us. The word "borderline" may cause the impression that here is a man who may be insane. The defense has definitely refrained from raising this issue; we are of the opinion that our client is sane in the legal sense which does not mean, however, that there are grave doubts about the strong degree of mental incapacity, as you have to call these borderline cases. We cannot exactly determine the degree in percentage but we have to assume that both psychiatrists having examined the accused for several times and having him subjected even to a so-called electroencephalogram test—to a real brain test, if they concur in the opinion that this man is to be considered on the borderline between mental incapacity and capacity we know something at least. Assuming that he is legally sane, which I do not doubt a moment, still the degree having brought him to the borderline of schizophrenia, the degree to which he is to be considered mentally inferioritated, mentally incapacitated, seems to me a very high one. I, therefore, consider the opinion of the psychiatrists as the most important one, and I ask you to kindly consider this opinion as an essential factor in determining to which extent he deserves extenuating and mitigating circumstances.

I wish to say finally that the kind of sentence which we

are going to fix today should, after all, consider his background: it should consider that the man for the first time in his life, due to certain surroundings, due perhaps to alcoholic influence, due most of all to his lack of inhibitions and his inferiority in a mental way being a borderline case of schizophrenia, that he does not deserve a harsh sentence. Let us not forget that our sentence should not eliminate this man from society, that the sentence should not destroy him for life, but should, if the sentence is just and fulfills the purpose it should serve, it should help that this man regain his place in society and serve again and perhaps in a better way his country.

Thank you.

DC: If I may—just a moment, please. If it please the court, I would like to say a few words about the mechanics of your sentence in this case. I would first, however, 34 like to point out something which Doctor Brandt, I believe, did not, and probably Doctor Jaffe through modesty would not. I don't know whether the court is familiar with this name "Jaffe" or not. Doctor Jaffe, however, is a world recognized authority in his field and, of course, there is no contest as to the psychiatric testimony here since both psychiatrists are in agreement.

My portion of this thing goes strictly to the mechanics of your sentence. You gentlemen, of course, have all had experience on courts-martial and you are aware that a common feature of a sentence in a court-martial case is a forfeiture. Generally with an accused soldier who is sentenced to a discharge, a punitive discharge, the sentence includes total forfeitures although it does not necessarily include forfeitures, they are not mandatory. Now since I know Major Tobin is a competent and conscientious law officer I am sure he will instruct you on this subject. Mr. Wilson, being a civilian, is not subject to forfeitures; he is, however, subject to be sentenced to a fine and I am sure the law officer will distinguish between those for you. Primarily the distinction is that a forfeiture means that a man loses pay which would accrue to him in the future; you are all no doubt aware that you cannot forfeit any pay of a soldier which has already accrued to him. A fine, on the other hand, must be paid by an individual out of his own pocket without regard to past or future pay. Now,

as a practical matter, when you sentence a soldier to a forfeiture the forfeiture ordinarily becomes effective on the date the convening authority takes action on the case, and the practical effect of it is simply that while the man is in confinement, awaiting discharge, he doesn't get paid; that's what it amounts to. Mr. Wilson isn't going to get paid any way, his pay is effectively cut off; so, even though your sentence should not include a fine he will be in the same position that a soldier would under like circumstances; he will not be receiving any income. I simply wanted to point this out to the court so that we could arrive at complete justice in the case. I do not feel that Mr. Wilson should be more severely punished than a soldier would be under like circumstances.

TC: If the court please, a few of what I consider important points. First, the psychiatric test. Gentlemen, let's realize that a man doesn't do the things Mr. Wilson did if he is a completely normal person; a man doesn't commit these acts without personality quirks. Psychiatrists have a nice funny name, a long one, one I can't even pronounce, for personality quirks which causes this sort of thing. A normal human being doesn't do these things, normaley, of course, being a relative term, a question of degree; so all we have is the psychiatrist telling us in a very nice way that the man has a personality quirk.

This sentence, Gentlemen, the law requires to be legal, appropriate, and adequate. There are several things that should be considered: (a) The possible perversion of these children; (b) We must set an example for the Command, for the children, that such conduct is of such a dangerous nature that we can effectively preclude its recurrence. We

35 must impress these children and Mr. Wilson that we detest and deplore such criminal conduct and that we punish it strongly and appropriately. This may or may not have lasting effect on these children; it will help in precluding its having such effect to show them how strongly we punish such conduct. If I may be so presumptuous as to suggest to the court a sentence between twelve and seventeen years; ordinarily on the surface this seems rather light for such an array of offenses; however, I will call the court's attention to the man's age, his previous good service, and his plea which precluded these

children having to come into this court to testify on the witness stand. More than seventeen years, I believe, would be inappropriate; less than twelve certainly inadequate.

IDC: May it please the court, I do not want to continue the trial too long—only a few words in replying to the argument of trial counsel. He attacked the opinion of the psychiatrists in the argument that practically speaking every man who commits acts of this kind in the homosexual field is definitely to be considered abnormal so the psychiatrists will go out and say: "Well, we have a kind of a split personality," which would mean in terms that no man who ever commits offenses of this kind could be considered fully normal and would be the kind of a case as the psychiatrists have testified here. I do not think this is correct. I think a psychiatrist knows well how to determine the degree of mental incapacity, and he knows, of course, where otherwise we wouldn't need ever a psychiatrist in a case of sexual offenses, how to determine that this man having committed abnormal acts is so to be considered, in the psychiatric way, an abnormal man or not. So, in other words, we shouldn't mix up at all the fact that a sexual offense is always a kind of abnormal act, which it is, and the fact that it depends, of course, entirely on the kind of personality and the degree of mental illness to which extent we may be able to say here is a normal-abnormal man—if I might use this expression—having just committed abnormal acts but he is completely normal, or, to which degree here is a man who does and commits abnormal acts but still, from a psychiatric point of view, deserves our leniency and mitigation in every way because his mental capacity, which has nothing to do with the kind of acts he committed, is inferior so much or that it is not of a degree as in a normal being. In other words, I cannot accept the thesis that anybody who commits homosexual acts should be considered abnormal and there would be no room for psychiatric examination. If this were the case I think we should dispose of any psychiatric examination in any court trial, which, as you all from your experience know, never has been done; on the contrary, the fact sometimes that this kind of homosexual relations are being committed, in certain cases they lead sometimes to the conclusion it is very good and proper in this case to have a

psychiatrist examine the man; but it is not absolutely sure that any act of this kind is to be considered an abnormal act, so we have to mete out a sentence and not bother about the degree of mental incapacity. I can only repeat in this particular case that, according to both psychiatrists, we have not only a small degree but we have such a high degree of mental incapacity that it may be even doubtful whether it is a few inches to the right

36 or a few inches to the left of the borderline. The defense is of the opinion that it is a borderline case without legal insanity, which we maintain strongly, and we ask the court to kindly follow us in this respect and to follow the psychiatrists. We have a case here of a very strong degree of mental inferiority which has to be considered when you mete out the sentence.

In conclusion allow me, please, to say one word in regard to the objects of these offenses—the boys and the juveniles who have been concerned. I know it is our duty to protect the young kids and I know, too, that we should consider perhaps lasting effect on these children. I cannot at this time, for technical reasons, introduce any evidence or refer to anything in this matter because after all the defendant has pleaded guilty, and having been sentenced as guilty we can only talk now about the degree of his guilt and about the circumstances in his favor or in his disfavor; but, since the trial counsel has introduced a kind of a reflection on the record I might call the attention of the court to the fact that if you read these trial records you will find, as I found, that actually all the boys concerned in this matter have been knowing quite well. I was amazed, if I might say this in conclusion, at the enlightenment, at the knowledge which these boys had developed in this particular field. I must say that it was quite a new experience to me, after reading these records, and I am sure the court has done so, seeing how well these boys concerned have been familiar with facts of life and facts of homosexual life. I do not wish, of course, that there could be ever any lasting effect on these boys, and I wish to say that just this idea and this consideration was it which made the accused man plead guilty to all charges because we wanted purposely and intentionally to avoid any of the repercussions which may have been

derived from putting anybody of the witnesses on the stand and having him going through the memories again. Nevertheless, if we tried to exhaust the record, if we are trying to appreciate and trying to follow it in any way, then we should not deny the fact that actually there was a kind of life going on in the community of these boys which apparently proves and shows that they knew much more about these things and that they practiced much more about these things than we can usually assume. It shows you, Gentlemen, that whatever the Code will say, and whatever our judicial conscience will feel about it, life is sometimes a little bit different from the way this Code has been created at the time of legislation. Life shows that certain things are usual and they happen actually without our wanting it, just because young men are now apparently more experienced and do certain things which perhaps are just as punishable under the law as the offenses committed by the accused here. We should bear in mind, of course, that these things are common, are usual, and though with disapproving them we should not deny the important fact that they still do not consider any crime of any offense worthy of this harsh sentence which the trial counsel has proposed you may impose upon the accused.

Again I ask you to please exercise your right for leniency and do not close the door entirely for this man in life. Give him the opportunity of again proving that he can be and will be a valuable member of society and take his place in our daily life as before. Thank you.

37 LO: Has the prosecution anything further?

TC: No sir, it does not.

LO: Although the Manual provides that the limitations set out in the Table of Maximum Punishments in paragraph 127c of the Manual are not binding upon courts in sentencing civilians subject to military law, the Manual does provide that the Table of Maximum Punishments may be used as a guide in determining appropriate punishment for civilians subject to military law, and, any confinement at hard labor imposed by you should not exceed the maximum provided in the Table of Maximum Punishments.

There are other limitations as to what may be legally imposed in the form of a sentence in this case. A civilian

subject to military law cannot be reduced in rank or grade; likewise, a civilian subject to military law is not subject to any type of punitive discharge or separation from the service. A court-martial may not adjudge hard labor without confinement against a civilian and, ordinarily, a fine rather than a forfeiture is the proper monetary penalty to be adjudged against a civilian subject to military law. Thus, the court-martial here today is limited in determining punishment to these types of punishment:

First, deprivation of liberty by way of confinement at hard labor or restriction to limits;

Second, adjudgment making the civilian pecuniarily liable in general to the United States for an amount of money specified in the sentence; and

Third, reprimand or admonition.

The Table of Maximum Punishments provides a maximum of seven years confinement at hard labor for each separate offense of indecent act or liberty with a child under the age of sixteen years. This is the offense alleged in the Specifications of Charge I. The Table provides a maximum of five years confinement at hard labor for each separate offense of sodomy, the offense charged in the Specifications of Charge II. The Table provides for a maximum of four months confinement at hard labor for each of the offenses charged in the Specifications of the Additional Charge. Thus, the cumulative maximum total in terms of confinement at hard labor which may be imposed here for the offenses charged is twenty-nine years and eight months.

If, in your deliberations, you should determine that a monetary penalty is appropriate you will find no guide in the Manual for measuring appropriate quantity. The Manual does, however, point out that the court should consider ability to pay, and provides further that in order to enforce collection a fine is usually accompanied by a provision in the sentence that, in the event the fine is not paid the person shall, in addition to any period of confinement adjudged, be further confined until a fixed period considered equivalent to the fine has expired.

38 Do you have any questions on what I have said so far or are there any questions that remain unanswered?

President: There appear to be none.

LO: I hand you now a sentence work sheet which may aid in properly reducing your sentence to writing. I hand the defense a copy of it for their inspection. You should, after finally determining your sentence, strike from the sentence work sheet the portions that are inapplicable and fill in the blanks as appropriate. You will see that there is a space on there for punishments which I have mentioned previously but which are not included in the work sheet.

Any questions now?

President: No.

TC: Do you have any objections to the work-sheet?

DC: No actual objections. I would like to point out that the way in which the brackets are arranged here could possibly lead to the conclusion that a fine is mandatory. In other words, the portion on fine is not included in brackets. I would like the court to be advised on that.

President: I think we understand that..

LO: My instruction, I think, has made that patently clear. In addition, I would refer defense counsel to the Manual for Courts-Martial to the model sentences; this is taken directly from the Manual.

President: The court will be closed.

The court closed at 1135 hours, 21 August 1956.

The court opened at 1210 hours, 21 August 1956.

President: The court will come to order.

TC: Let the record indicate that all parties to the proceedings who were present when the court closed are again present in court.

President: Bruce Wilson, it is my duty as president of this court to inform you that the court in closed session and upon secret written ballot, two-thirds of the members present at the time the vote was taken concurring, sentences you:

To be confined at hard labor for ten years.

39 LO: Has the prosecution any further cases to try at this time?

TC: It does not, sir.

President: The court will adjourn to meet at my call.

The court adjourned at 1211 hours, 21 August 1956.

40 AUTHENTICATION OF RECORD OF TRIAL
in the case of

BRUCE WILSON, AGO A-407 943, GS-11, Department of
the Army Civilian Comptroller Division, Berlin Command
(7781), Department of the Army, Berlin, Germany

FRANCIS X. BRADLEY

Francis X. Bradley

Lt. Col., Inf., President

HORACE L. JENNERSON

Horace L. Jennerson, Lt Col, SigC,

a member in lieu of the law officer

because of his absence.

I have examined the record of trial in the foregoing case.

MELBURN N. WASHBURN

Captain, JAGC, Defense Counsel

41

Defense Exhibit "A"

Form approved.

Budget Bureau No. 50-R0123.

Standard Form No. 51

August 1946

U. S. Civil Service Commission

Administrative-Unofficial ()

Official:

Regular () Special ()

Probational (x)

REPORT OF EFFICIENCY RATING

As of 22 August 1947 based on performance during
period from 22 Oct 1946 to 22 Aug 1947, Bruce Wilson,
Auditor, CAF-930-9, Fiscal Section, PHILRYCOM, APO
707

42

3 September 1947

Your efficiency rating from 22 Oct 46 to 22 Aug 47 is
Excellent.

DONALD O. THURNAU

Donald O. Thurnau

Chief, Adm Div, CPS

43

Defense Exhibit "B"

HEADQUARTERS
USAREUR AUDIT AGENCY, 7756TH AU
APO 757 U.S. ARMY

25 January 1955

Dear Mr. Wilson:

I am happy to forward Standard Form 50, dated 20 January 1955, which discloses your promotion from GS-10 to GS-11.

This promotion is made possible through a reclassification of your position and a related determination that your experience and or educational qualifications meet Civil Service requirements, together with my belief that your performance with this Agency has been of such quality as to warrant placing you in a position of higher trust and responsibility.

Please accept my heartiest congratulations on this achievement.

Sincerely yours,

/s/ J. A. MARTIN

J. A. Martin

Colonel FC

Chief

Mr. Bruce Wilson
Resident Auditor
Berlin Audit Residency
USAREUR Audit Agency

A Certified True Copy

ZANE E. FINKELSTEIN

Zane E. Finkelstein, 1st Lt. JAGC

Trial Counsel

Defense Exhibit 'C'

HEADQUARTERS

USAREUR AUDIT AGENCY, 7756TH AU

APO 757

US ARMY

AA-C 201-WILSON, Bruce (Civ)

24 August 1955

SUBJECT: Letter of Appreciation

To: Mr. Bruce Wilson
Resident Auditor
Berlin Audit Residency
USAREUR Audit Agency, 7756th AU
APO 742, US Army

1. With the imminency of your departure from this organization, I wish to take this opportunity to extend my sincere thanks and appreciation to you for a splendid performance of your assigned duties.

2. Although I have have not had the opportunity to observe your work for a prolonged period, the high praise which I heard showered upon you during my recent trip to the Berlin Command left no doubt in my mind of the high calibre of performance you have rendered. All elements of the Berlin Command had infinite regard for your abilities, were appreciative of your sound advice and counsel, and enjoyed your friendly cooperation. Your actions and performance have done much to enhance the reputation and prestige of this agency throughout the Command.

3. This agency will miss your help but we are glad that you have found the opportunity for employment more in accordance with your desires. The best wishes of myself and staff accompany you to your new assignment.

4. A copy of this correspondence has been made a part of your official 201 file.

/s/ J. G. BLACK

J. G. Black

Colonel FC

Commanding

A Certified True Copy

ZANE E. FINKELSTEIN

Zane E. Finkelstein, 1st Lt. JAGC

Trial Counsel

45

Defense Exhibit "D"

UNITED STATES

-vs.-

BRUCE WILSON, CIV.

STIPULATION

It is hereby stipulated by and between the prosecution and the defense, with the express consent of the accused, that if Dr. Werner Jaffe, 8 Paulsborner Strasse, Berlin, Germany, were present in court and duly sworn, he would qualify as an expert witness in psychiatry and would testify substantially as follows:

I am presently engaged in the practice of medicine, specializing in psychiatry and neurology in Berlin, Germany. I have studied both in Germany and the United States, have been a resident psychiatrist in an American hospital, and have practised psychiatry in New York City.

Mr. Bruce Wilson was seen by me about five times during the month of July and August 1956 at the 279th Station Hospital in Berlin, Germany, for psychiatric interview. According to his physical constitution, personal development and status, he can be classified as a typical schizoid personality, not to be confused with a schizophrenic. He gives a history of having descended of a family where strictness seemed to be more important than warmth or affection, and he apparently had and has no contact with his family and no real attachment of parent and sibling.

His life appears to have been an unsteady one concerning both his professional and his interpersonal relations. His history indicates that he never had any true and warm attachments for any person or object. I had the impression that the only time he seemed to show some kind of emotion was when he talked of his three dogs, two of which had to be killed during his absence. He is a person without any

deep-seated and lasting interpersonal or social relations at all.

He has had hetero- and homosexual relations as well. He never experienced any kind of real love in the broader sense and on a mature level. He never experienced a lasting friendship and does not feel that he belongs to anybody, society, or religion besides himself. His history indicates that all interpersonal, social, or professional experiences or attachments were of short duration and quite superficial. The early development, socialization, sexual attitude, social adjustment, and occupational history are quite significant for a schizoid, self-centered personality. In the field of general behavior, sensorium, and intellectual capacities, Mr. Wilson does not show any abnormal

46 signs. It is my opinion that, at the time of the offenses with which he is charged, he was capable of distinguishing right from wrong and of adhering to the right, and that at the present time he is capable of understanding the nature of the proceedings against him and cooperating in his own defense.

The emotional picture is superficially one of indifference and euphoria. There are, however, underlying anxieties, tensions, and much hostility against the world and society in which the patient feels misunderstood.

Thought contents and thought mechanism are not psychotic. There is no insight that the trouble the patient is in at the moment arose from his abnormal personal troubles and are not caused by a "backward" society.

Besides the abnormalities mentioned, there are definite psychopathic personality traits. Before and during the interview, the patient mentioned quite often the fact that the room may be wired, that the guard may be listening to the interview, that in the room next to the one we were in a recording machine may be installed, and so forth. Consequently the patient crawled quite frequently about the floor all over the room looking under tables, watching the central heating system, window vents, and so forth.

The patient admits having drunk much alcoholic beverages because of living under nervous strain from overwork in his office. He thinks that the influence of overwork, nervous strain, and drinking habits were responsible for the sexual aberrations which occurred in his home and which finally gave rise to his present difficulties.

Summarizing all the facts known about the early development of Mr. Wilson, of his position in society, his professional ways, his sexual habits, and his kind of thinking, one may call Mr. Wilson a rationalizing, self-centered, schizoid personality, as distinguished from any mental aberration, who, while legally sane, never had and never will have any real deep-seated or true emotionally underlined contact with anything or anybody besides himself.

His incapability of adjusting to any kind of sexuality of a lasting hetero- or even homosexual kind should be judged only as a part of a general, almost psychotic disturbance of his personality and the impossibility of any kind of adjustment and normal interpersonal contact. Mr. Wilson should therefore be considered a psychopathic personality on the borderline of schizophrenia.

MELBURN N WASHBURN

Melburn N Washburn

Capt, JAGC

Defense Counsel

BRUCE WILSON

Bruce Wilson

DA Civilian

Accused

ZANE E FINKELSTEIN

Zane E Finkelstein

1st Lt, JAGC

Trial Counsel

DR. ARTHUR BRANDT

Individual Defense Counsel

47

Defense Exhibit "E"

UNITED STATES

vs.

BRUCE WILSON, CIV.

STIPULATION

It is hereby stipulated by and between the prosecution and the defense, with the express consent of the accused,

that if Captain H. M. Bertram, Medical Corps, 279th Station Hospital, Berlin, Germany, were present in court and duly sworn, he would qualify as an expert in psychiatry and would testify substantially as follows:

I have conducted psychiatric examination and evaluation of Mr. Bruce Wilson. As a result of my examination, I conclude that at the time of the offenses with which he is now charged, he was mentally capable of distinguishing right from wrong and of adhering to the right, and that at the present time he is capable of understanding the nature of the proceedings against him and of cooperating in his own defense.

I have further concluded that, although Mr. Wilson is not psychotic, he is a psychopathic personality tending toward and on the borderline of schizophrenia.

ZANE E. FINKELSTEIN

Zane E Finkelstein

1st Lt, JAGC

Trial Counsel

MELBURN N WASHBURN

Melburn N Washburn

Capt, JAGC

Defense Counsel

DR. ARTHUR BRANDT

Individual Defense Counsel

BRUCE WILSON

Bruce Wilson

DA Civilian

Accused

Appellate Exhibit 1

UNITED STATES

vs.

BRUCE WILSON, AGO A-407 943, GS-11, Department of the Army Civilian Comptroller Division, Berlin Command (7781) Berlin, Germany

0946 Hours, 21 August 1956

OUT-OF-COURT-HEARING

LO: What is the nature of your argument?

IDC: I, on behalf of the accused, move for the dismissal of the charges for reasons of lack of jurisdiction. This is the first case, to my knowledge, where any civilian employee of the Army was subject to court-martial. The general rule of this kind recognizes that the military jurisdiction is exercised also in regard to civilian employees yet no case of this kind, to my knowledge, has ever been decided upon by the Supreme Court so, of course, I have to leave this question as it stands and leave it perhaps to future review by civil courts or by the board of review whether really, as generally assumed, there is jurisdiction over civilian employees. In this particular case I would like to emphasize, however, that the accused was formerly under contract with the Army as a civilian employee but which contract had expired years ago and from there on has been silently continued on a verbal basis. This contract has been finally terminated by the voluntary resignation tendered by the accused effective yesterday. I think it can be assumed or, if necessary, we may submit evidence that it is a fact that the accused has tendered his resignation to the Civil Personnel Officer effective August 20, at 1700 hours. According to the opinion held by the defense, the termination of the employment also makes cease the jurisdiction of the military court with certain exceptions and I must add here, and I can now refer to the Manual on page 14, that none of these exceptions, in my opinion, fall under the category we have to decide here. Exception number one reads that to the general rule of ceasing jurisdiction some exceptions are recognized which include the following: "Jurisdiction as to an offense against the code for which a court-martial may adjudge confinement for five years or more committed by a person while in the status in which he was subject to the code"—no doubt this is the case but in this case also it is said: "and for which he cannot be tried in the courts of the United States or any State or Territory thereof" and so on. Number three: "Jurisdiction under Article 3a should not be exercised without the consent of the Secretary of the Department concerned."

Now three factors have been combined to make jurisdiction possible. Number one is given; number two, in my opinion is not given for the simple reason that the accused, being a civilian, even if he is outside the territory of the United States he can always be tried
 49 by a civil court within the territory of the United States even if the offense he is being charged with has been committed outside the territory. We have these cases in many instances. I remind you perhaps of the quite famous case of the Major—I don't want to call his name—who committed, while in the Army, a murder on the Beach of Cassino in Italy, and he was charged with having killed his superior officer and finally after being discharged was brought to justice before the Federal Civilian Court in the United States. So having jurisdiction over a civilian who is now, at the time we start proceedings here, an employee of the United States Army, in my opinion the jurisdiction has ceased definitely from the moment on where he terminated his employment with the Army. Whereas it may not be decided upon right now I raise the objection for the record; also it is very doubtful, in my opinion, that at the time he committed the offenses even if at this time he was an employee of the Army he would be subject to military procedure and to court-martial.

I know that there will be an objection raised by the trial counsel. I know it is generally assumed, although no foundation for this assumption has ever been given, that when a trial has started whereby the definition of the trial is apparently used in a wider and broader sense, in other words if military procedure has opened and at this time the accused was subject to military procedure, then if this has been done with a view to trial it will continue. I do not see any foundation in this assumption, there is no proof for it, it is just a general idea, but on the other hand I feel it is my duty to bring this to the knowledge of the law officer and have it put into the record. I do not see any foundation for the generally assumed fact that just the opening of a proceeding or the opening of an investigation, which is always the case, with a view to later trial will practically establish court-martial jurisdiction—military jurisdiction—once and for all. In my

opinion the termination of the employment by the accused makes him not longer liable and subject to military procedure and for this reason I move to dismiss the charges for lack of jurisdiction.

DC: If I may I would like to add just one thing. If the law officer requires it defense is prepared to prove that Mr. Wilson's resignation, effective yesterday, was received yesterday by the Civilian Personnel Officer in this Headquarters.

TC: Prosecution is willing to stipulate that a piece of paper purportedly signed by Mr. Wilson and purportedly containing his resignation was received by the Civilian Personnel Officer in this Command yesterday.

The court's attention is respectfully directed to the provisions of paragraph (11), Article 2 of the Uniform Code of Military Justice, which provides that: "Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States and without the following * * * " non-applicable territorial limitations, are subject to the code.

50 Prosecution is prepared to prove that the accused has been employed by the United States Army for the last nine years and five months and at the time of the offenses, his apprehension, the reference for trial, and the service of charges, he was employed by the Comptroller Section of Berlin Command, he was entitled to MPC's and was so paid, that he carried an AGO Card and a Passport indicating that he was accredited to the U. S. Commander of Berlin; that the accused occupies an apartment built under the supervision of the Berlin Command Engineer upon property requisitioned by the United States Army and with funds provided for the cost of occupying Berlin; that the accused had previously entered and departed Berlin pursuant to orders issued by order of the Commanding General of Berlin Command; that the accused regularly purchased goods and services from the European Exchange System operated by the United States Army, the Quartermaster Commissary Store, and the U. S. Army Post Office; that his dogs and telephone were and

are listed in separate registers and directories maintained by the United States Army; that, in short, the accused at the time of the offenses was and is now a member of the military community of Berlin as distinguished from the indigenous population. The prosecution can further show that the accused by being so employed and by so accompanying the U. S. Army in Berlin is not subject to the civil or criminal jurisdiction of the Berlin Courts pursuant to Allied Kommandatura Law 7.

The power of Congress to make amenable to military jurisdiction the classes of civilian personnel mentioned in the cited reference to the Uniform Code of Military Justice, including the accused, is so well settled as to be really beyond dispute. The attention of the court is respectfully drawn to Aycock and Wurfel "Military Law Under the Uniform Code of Military Justice", on page 53 et seq., where a complete digest of all the cases, including United States Supreme Court cases, can be found, and to the recent United States Supreme Court cases of *Kinsella v. Krueger*, 713, and *Reid v. Covert*, 701, decided on 11 June 1956, wherein congressional power to make such persons subject to military law is given renewed sanction.

With regard to the accused's resignation, it is well settled that jurisdiction once attached continues for all purposes. The Executive Order provision for this can be found in paragraph 11d, Manual for Courts-Martial, 1951, that the accused cannot terminate it by his own voluntary act. I respectfully call the court's attention to *Perlstein v. United States*, 151 Federal 2d, on page 167, where a certiorari was dismissed by the United States Supreme Court at 328 U.S. 822, and the recent case of the *United States v. Rubenstein* recently decided by the U. S. Court of Military Appeals. In the latter case the accused, prior to apprehension, prior to service of charges, quit his job and removed himself to the Republic of Korea; the court therein held that he was still amenable to the Uniform Code of Military Justice. The *Covert* case is interesting in this particular since a rehearing was ordered by the Court of

51 Military Appeals and the rehearing was held in the United States, and again the court, with the United States Supreme Court sanction, stated that jurisdiction once attached continues for all purposes.

IDC: The defense does not deny that at the time of the charged offenses the accused was employed; only the defense maintains that at the time of the trial, as of today, the employment has terminated which, of course, the trial counsel does not object to either. Now, of course, as to the legal aspects of this case I should like to refer to the section of Article 3 (a) of the Code which seems to me the essential one.

Article 3 (a) again absolutely makes it essential that as a requirement for military jurisdiction you must establish the fact that the person cannot be tried in the courts of the United States or any territories thereof. This is not the case in our case. We have a situation here where a man having terminated his employment with the United States Army can always be tried in the Federal Court of the United States in spite of the fact that the offenses charged have been committed outside of the United States, and this factor missing I do not see any chance how military procedure can continue—we have to turn him over to the civilian authorities and courts. The trial counsel refers, in this respect, to the so-called effect of termination of term of service which is reprinted in the Manual on page 16. May I respectfully call the attention of the law officer to the fact that this apparently does not concern our case. We have there a case that if action is initiated with view to trial because of an offense committed by an individual prior to his official discharge, he may be retained in the service for trial to be held after his period of service which otherwise had expired. We have here, first of all, nothing but the Command; we have nothing which can be considered the real opinion of the higher court; and secondly, it does not affect our case because apparently this is a case where someone can be retained in the service so it must be a person really being enlisted or otherwise belonging to the armed forces which can then be retained in the service and this, you will agree with me, cannot be done in the case of Mr. Wilson. He is a civilian employee and he is always in the position and able and capable of terminating the employment, and the case apparently meant there has not definitely been decided; the opinion of the Manual has never been decided, to my knowledge, and this case does not absolutely affect the

decision we have to make here. So, not only for the record but also for the actual dismissal of the charges, I move that here is no jurisdiction and for lack of jurisdiction my motion goes for dismissal of the charges.

TC: If the law officer please, one further factor for the record. I think the court is capable of judicially noting - and the law officer, also—that Berlin, Germany, is outside the territorial and maritime jurisdiction of the United States and outside the applicable provisions of Title 18 of the United States Code. The recent case of *Toth v. Talbott* casts sincere doubt upon the applicability of Article 3 (a) of the Uniform Code of Military Justice and the trial counsel is not relying solely thereupon.

52 The trial counsel is relying on Article 2 (11) of the Uniform Code of Military Justice, primarily on the assertion that the jurisdiction exists.

LO: What is the citation—I believe you said Perlstein—

TC: Yes sir. *Perlstein v. United States*, 151 Federal 2d, 167; certiorari dismissed at 328 U.S. 822.

IDC: May I, with your permission, raise one last point? It had better be raised in a question. Under Article 3 (a) has the necessary consent been obtained of the Secretary of the Department concerned?

TC: Prosecution is most willing to stipulate that there is no express permission from the Secretary of the Army to try this particular case.

IDC: You mean to say that it is necessary but the answer would be that it hasn't been obtained?

TC: I am not willing to concede that it is necessary; I am willing to concede that it has not been acquired.

IDC: Thank you.

LO: The motion for dismissal on the ground of lack of jurisdiction is denied.

The court will be recalled.

Let the record reflect that present at this out-of-court hearing was the law officer, the accused, counsel for both sides, and the reporter, and that a verbatim transcript of the proceedings will accompany the record as Appellate Exhibit 1.

The out-of-court hearing was terminated at 1019 hours, 21 August 1956.

COURT OF MILITARY APPEALS

UNITED STATES, Appellee

v

BRUCE WILSON, GS-11, Department of the
Army, Civilian, Appellant

9 USCMA 60, 25 CMR 322

Courts-martial § 47—constitutionality of jurisdiction over
civilian employees overseas.

1. The provisions of UCMJ, Art 2(11) extending court-martial jurisdiction to persons employed by the armed forces without the continental limits of the United States and certain territories thereof, are constitutional insofar as applied to a civilian employee of the Army who was in Germany pursuant to his employment, who used military housing and exchange facilities in connection with his employment and residence in Germany and who was not subject to the civil or criminal jurisdiction of the German courts. (Citing U. S. v Burney, 6 USCMA 776, 21 CMR 98; U. S. v Rubenstein, 7 USCMA 523, 22 CMR 313; U. S. v Marker, 1 USCMA 393, 3 CMR 127 and other cases. Distinguishing Reid v Covert, 354 US 1, 1 L ed 2d 1148, 77 S Ct 122.)

Courts-martial § 47—jurisdiction of civilian employees
overseas—effect of resignation.

2. The accused's amenability to trial by court-martial was not terminated by his submission of his resignation from his job the day before trial where charges had been served and the Art 32 investigation had been conducted almost two months earlier. Under these circumstances, jurisdiction had attached before tender of the resignation and the proceedings could, therefore, continue to completion. (Citing U. S. v Robertson, 8 USCMA 421, 24 CMR 231; U. S. v Rubenstein, 7 USCMA 523, 22 CMR 313.)

Defenses § 35; Pleas § 9—evidence of mental condition insufficient to render guilty plea improvident.

3. The evidence of the accused's mental condition, presented during the sentence proceedings, was not incon-

sistent with his pleas of guilty where, although indicating the accused was suffering from a disorder described as a schizoid personality, the psychiatric testimony also indicated the accused was capable of distinguishing right from wrong and of adhering to the right and was able to understand the proceedings against him and to cooperate in his defense. Furthermore, the defense counsel specifically stated he was not contending the accused was insane and only wanted the accused's mental condition considered as a matter of extenuation and mitigation. (Citing U. S. v Hinton, 8 USCMA 39, 23 CMR 263.)

No. 9638

Decided March 28, 1958

On petition of the accused below. CM 392423, not reported below. Affirmed.

First Lieutenant Jerome H. Gerber argued the cause for Appellant, Accused. With him on the brief were *Colonel James M. Scott, Captain Arnold I. Melnick, and First Lieutenant Bert M. Gross.*

54 *First Lieutenant Richard W. Young* argued the cause for Appellee, United States. With him on the brief were *Lieutenant Colonel John G. Lee, Lieutenant Colonel Thomas J. Newton, and First Lieutenant Arnold I. Burns.*

Joseph M. Snee, S.J., on amicus curiae brief.

Arthur John Keeffe, Esquire, on amicus curiae brief.

Rear Admiral Chester Ward, USN, and Commander Carl B. Klein, USNR, on amicus curiae brief.

Lieutenant Colonel Robert W. Michels, USAF, and Major Fred C. Vowell, USAF, on amicus curiae brief.

Opinion of the Court

ROBERT E. QUINN, Chief Judge:

The accused is a civilian. He was employed by the Department of the Army in the Comptroller Division, Berlin Command. He went to Berlin on a passport accrediting him to the U. S. Commander of Berlin, and he entered and departed from Berlin at various intervals during his employment pursuant to orders issued by the military.

Military housing and exchange facilities were used by him in connection with his employment and residence in Berlin. It also appears that he was not subject to the civil or criminal jurisdiction of the Berlin courts by virtue of the provisions of Allied Kommandatura Law No. 7.

On his plea of guilty, a general court-martial convicted the accused of three acts of sodomy, in violation of Article 125, Uniform Code of Military Justice, 40 USC § 925, two charges of lewd and lascivious acts with persons under the age of sixteen; and two specifications alleging the display of lewd and filthy pictures to minors, with the intent to arouse their sexual desires. It is concluded that because the accused is a civilian he is not constitutionally subject to trial by court-martial. We rejected like arguments in a number of previous cases and sustained the constitutionality of Article 2(11) of the Uniform Code which subjects to trial by court-martial "persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States" and without certain other territories of the United States. *United States v Burney*, 6 USCMA 776, 21 CMR 98; *United States v Rubenstein*, 7 USCMA 523, 22 CMR 313; *United States v Marker*, 1 USCMA 393, 3 CMR 127.¹ The question is raised anew, however, by the decision of the United States Supreme Court in *Reid v Covert*, 354 US 1, 1 L ed 2d 1148, 77 S Ct 1222 (1957). In that case the Supreme Court held Article 2(11) to be unconstitutional as applied in a capital case to a civilian dependent of a serviceman who accompanies such serviceman outside the United States and the specified territories.

Writing the majority opinion for the court, Mr. Justice Black noted that the wives, children, and other dependents of servicemen could not be regarded as members of the land and naval forces, though accompanying servicemen abroad at Government expense and receiving benefits from the Government such as quarters, medical care and ex-

¹ We prefer to reach the question of jurisdiction in this case under the provisions of subdivision 11 of Article 2 rather than consider whether the circumstances obtaining in Berlin constitute that area occupied territory, as contended by Army Government counsel. See TIAS 3425, 3427; also *Reid v. Covert*, 354 US 1, 1 L ed 2d 1148, 77 S Ct 1222, footnote 61.

change privileges, any more than if they were "living on a military post in this country." As citizens of the United States they were entitled, in a capital case, to indictment by a grand jury and to trial by a jury in a court of law, as required in the Fifth and Sixth Amendments to the United States Constitution. In the course of his opinion,

Justice Black referred with approval to Colonel Winthrop's statement that no statute can be framed
55 *"by which a civilian can lawfully be made amenable to the military jurisdiction in time of peace."* Significantly, however, the Justice specifically observed that

"there might be circumstances where a person could be 'in' the armed services for purposes of clause 14 [of Article I, section 8 of the United States Constitution] even though he had not formally been inducted into the military or did not wear a uniform." *Id.* at page 23. From the latter standpoint the critical inquiry is the nature of the civilian's "contact or relationship with the armed forces." *Id.* at page 30.

Under clause 14 of Article I, section 8, Congress is granted the power "to make Rules for the Government and Regulation of the land and naval Forces." In exercising its power Congress does not act as an automaton. Rather, it possesses wide discretion to determine the measures and means necessary for complete and effective use of its power. Contemporaneously with the adoption of the Constitution, Congress subjected to military law "retainers to the camp" because they were closely connected with the proper functioning of the uniformed forces in the field. Under the Uniform Code, the designation has been changed by Congress to include persons "employed" by the armed forces in foreign lands. Cogent reasons exist for the identification of such persons with uniformed personnel for the purpose of the regulation of their conduct. We discussed many of these reasons in the *Burney* case, and we need not reiterate them here. See also *United States v. McElroy*, 158 F Supp 171 (D DC) (1958), in which Judge Holtzoff denied a petition for habeas corpus for a civilian employee convicted by an Air Force court-martial at the Nouasseur Depot, Morocco. Suffice it to say that employees of the armed forces abroad are not present with the military merely for morale or convenience. They both

live and work in the military community. They are required for, and are depended upon to carry out, the assigned missions of the military forces overseas. Functionally, as well as practically, they are either "part of the armed forces" or "so directly connected with such forces" as to be inseparable from them for the purpose of observing the standards of conduct prescribed by Congress for the government of the military.

In recognizing the essential oneness of service and community life between those in uniform and those out of uniform, Congress did not expand military jurisdiction "at the expense of the normal and constitutionally preferred system of trial by jury." *Toth v Quarles*, supra, pages 22-23. It was simply exercising its constitutional power to make rules for the government of the armed forces. We hold, therefore, that as applied to employees of the armed forces under the circumstances of this case, Article 2(11) of the Uniform Code is constitutional.

The accused also attacks the right of the military to try him on the ground that he terminated his amenability under Article 2(11) by submitting a resignation from his job. The resignation was tendered the day before trial. Charges had been served and the Article 32 pretrial investigation had been conducted almost two months earlier. Manifestly, jurisdiction over him had attached long before the tender, and the proceedings could, therefore, continue to completion. *United States v Robertson*, 8 USCMA 421, 24 CMR 231; *United States v Rubenstein*, 7 USCMA 522, 22 CMR 313.

Turning to the merits of the case, the accused contends that he was prejudiced by the law officer's failure to withdraw his plea of guilty and direct that he be tried as though he had entered a plea of not guilty. He maintains that evidence of his mental condition, which was presented during the sentence procedure, is inconsistent with his plea of guilty on four of the charges. See Article 45(a), Uniform Code of

² *Toth v Quarles*, 350 US 11, 15, 100 L ed 8, 76 S Ct 1 (1955).

³ *Duncan v Kahanamoku*, 227 US 304, 313, 66 S Ct 606, 90 L ed 688 (1946).

Military Justice, 10 USC § 845; United States v. Trede, 2 USCMA 581, 10 CMR 79.

56 The evidence relied upon by the accused is in the form of a stipulation of testimony by two psychiatrists. One doctor described the accused as a "typical schizoid personality, not to be confused with schizophrenia." The witness went on to say that in "the field of general behavior, sensorium, and intellectual capacities," the accused does not show "any abnormal signs." The doctor also observed that the accused—thought content and thought mechanisms were not psychotic and he found "no insight that the trouble the patient is in . . . arose from his abnormal personal troubles." Finally, the doctor said that in his opinion the accused was capable of distinguishing right from wrong and of adhering to the right at the time of the commission of the offenses and that he was able to understand the proceedings against him and to cooperate in his defense. The stipulated testimony of the second doctor is substantially to the same effect. In part, he said that the accused tended "toward and on the borderline of schizophrenia."

At the trial the accused was represented by individual civilian counsel and appointed defense counsel. In evaluating the psychiatric evidence the accused's counsel conceded that it raised no issue regarding the accused's legal responsibility for the offenses to which he pleaded guilty. Individual counsel in part said:

" . . . The word 'borderline' may cause the impression that here is a man who may be insane. *The defense had definitely refrained from raising this issue; we are of the opinion that our client is sane in the legal sense* which does not mean, however, that there are grave doubts about the strong degree of mental incapacity, as you have to call these borderline cases. We cannot exactly determine the degree in percentage but we have to assume that both psychiatrists having examined the accused for several times and having him subjected even to a so-called electro-encephalogram test—to a real brain test, if they concur in the

* In the lexicon of psychiatry the described condition falls into the category of behavior disorders. SR 40-1025-2, June 1949.

opinion that this man is to be considered on the borderline-between mental incapacity and capacity we know something at least. *Assuming that he is legally sane, which I do not doubt a moment*, still the degree having brought him to the borderline of schizophrenia, the degree to which he is to be considered mentally inferioritated, mentally incapacitated, seems to me a very high one. *I, therefore consider the opinion of the psychiatrists as a most important one*, and I ask you to kindly consider this opinion as an essential factor in determining to which extent he deserves extenuating and mitigating "circumstances." (Emphasis supplied.)

A similar situation was presented to us in *United States v. Hinton*, 8 USCMA 39, 23 CMR 263. What we said there applies equally to this case and provides a complete answer to the accused's claim of error.

"Incidental evidence of a mental condition is not proof of the existence of the condition to that degree which the law requires before it will hold harmless a person who commits an act which, but for the condition, would be criminal. . . . In a guilty plea case we cannot disregard the probability that the accused and his counsel weighed the evidence and determined that it was inadequate for an effective legal defense or to negate the existence of a specific intent. As a result, they could well have decided to disregard the evidence in favor of the possible advantage of a guilty plea. . . . The critical question, therefore, is whether the accused and his counsel were aware of the legal effect of the evidence claimed to be inconsistent with the plea of guilty.

* * * *

"... Moreover, it is not contended on this appeal that the accused is anything but legally sane and fully responsible for the offenses for which he was convicted or even that he has any other meritorious defense. Under the circumstances, we must conclude that the plea of guilty was not improvidently entered. Indeed, on this record it would be a 'hollow gesture' if

we were to set aside the plea of guilty and order a rehearing. *United States v Wright, supra, page 189.*"

The decision of the board of review is affirmed.
Judges LATIMER and FERGUSON concur.

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6161

(File Endorsement Omitted)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil No. 6161

THE UNITED STATES OF AMERICA
ex rel. BRUCE WILSON, *Petitioner.*

v.

MAJOR GENERAL JOHN F. BOHLANDER, Commander,
Fitzsimons Army Hospital, Denver, Colorado,
Respondent.

Messrs. Arthur John Keefe, Esq., George J. Noumair, Esq., Washington, D. C., and William C. McCleary, Esq., Denver, Colorado, for Petitioner; Donald E. Kelley, Esq., United States Attorney, and John S. Pfeiffer, Esq., Assistant United States Attorney, Denver, Colorado, and F. M. Sasse, Colonel, JAGC, Fitzsimons Army Hospital, Denver, Colorado, and Lt. Col. Peter S. Wondolowski, JAGC, U.S. Army, Washington, D. C., for Respondent.

Memorandum Opinion and Order—Nov. 10, 1953

ARRAJ, District Judge.

This matter is before the Court on a petition for a Writ of Habeas Corpus. The petitioner is and at all times pertinent hereto was a citizen of the United States employed as a civilian auditor by the Department of the Army in the Comptroller's Division in Berlin, Germany. During the time he was so employed, petitioner was charged with certain offenses in violation of Articles 125 and 134 of the Uniform Code of Military Justice. On his plea

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of guilty a General Court Martial convicted him of

various violations of the said Articles and sentenced him to 10 years at hard labor; the Commanding General approved the conviction and reduced the sentence to 5 years. The Board of Review affirmed the conviction and the Court of Military Appeals affirmed the Board's action. *United States v. Bruce Wilson*, 9 USCMA 60, 25 CMR 322 (1958).

~~Petitioner has been detained and confined under the jurisdiction of the United States Army, under said sentence, since August 21, 1956, and is presently confined in this district at Fitzsimons Army Hospital, Denver, Colorado.~~

Petitioner has filed his Petition for a Writ of Habeas Corpus in this Court contending that his arrest, detention and confinement by the military authorities has been and is unlawful and in violation of the Constitution of the United States; he further contends that as an American citizen and civilian he could not be tried by court martial, and that only a Court constituted under Article III of the Constitution has jurisdiction to try him.

Respondent defends on the ground that jurisdiction was proper under Article 2(11) of the Uniform Code of Military Justice. Thus, the sole question to be determined by this Court is whether Article 2(11) of the Uniform Code of Military Justice can be constitutionally applied to an American citizen employed by the Department of the Army overseas as a civilian who is charged with a crime in time of peace.

Article 2 of the Uniform Code of Military Justice, 10 U.S.C.A. Sec. 802, reads as follows:

Article 2. Persons subject to this chapter.

The following persons are subject to this chapter:

- 60 (11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States and outside the following: that part of Alaska east of longitude 172 degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands.

The relevant portions of the Constitution under which respondent seeks to sustain the constitutionality of Article 2(11) are Article I, Section 8, Clause 14, which provides that,

"The Congress shall have Power * * * To make Rules for the Government and Regulation of the land and naval Forces."

and the final clause of Article I, Section 8, which empowers Congress to make all laws which shall be necessary and proper for carrying into execution,

"... the foregoing Powers, and all other Powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

The starting point in any discussion of Article 2(11) is *Reid v. Covert*, 354 U.S. 1 (1957), which for the first time, raised serious doubts concerning court martial jurisdiction over civilians generally, although the case was directly concerned only with dependents in capital cases. That case involved the trial by court martial of a dependent wife for the premeditated murder of her serviceman husband. Justice Black, speaking for himself, the Chief Justice, and Justices Douglas and Brennan, held that the necessary and proper clause could not expand jurisdiction to cover persons not within the terms of Clause 14. Although he did not define the precise boundary between civilians and those in the land and naval forces, he held that dependents were not within Clause 14, and therefore no authority existed for depriving them of their rights as civilians under other provisions of the Constitution. The language of the opinion is broad in certain phases and it appears to
61 embrace civilians generally, without restriction to dependents. Justice Frankfurter concurred in the result, but limited his opinion strictly to dependents in capital cases.* He found it necessary to,

"Weigh all the factors involved in these cases in order to decide whether these women dependents are so closely related to what Congress may allowably deem essential for the effective 'Government and Regulation' of the 'land and naval Forces' that they may be

subjected to court-martial jurisdiction in capital cases, when the consequence is loss of the protections afforded by Article III and the Fifth and Sixth Amendments."

In weighing these considerations, he concluded that their proximity to the armed forces was not so clearly demanded for the effective government and regulation of the armed forces as to justify court martial jurisdiction over capital offenses. Justice Harlan also concurred in the result, and on even narrower grounds. He reasoned that Clause 14 was modified by the necessary and proper clause, and that dependents had sufficiently close connection with the proper and effective functioning of our overseas forces to justify court martial jurisdiction. On the other hand, whether an absolute right to the guarantees of the Constitution existed depended on the circumstances, and, in a capital case, those guarantees were so important that the dependents here could not be deprived of them. Justice Clark, with whom Justice Burton joined, dissented. They saw no distinction between capital and non-capital cases, and thought that Article 2(11) was reasonably necessary to the power of Congress to provide for the government of our armed forces. Justice Whittaker took no part in the decision.

The first issue to resolve is whether civilian employees of the armed forces overseas are within the terms of Article I, Section 8, Clause 14 of the Constitution.

62 In a series of early cases, paymaster's clerks were held to be "in military service" for jurisdictional purposes; however, it is noted that these clerks, although not enlisted or drafted, or regular or reserve officers, nevertheless possessed more than the usual indicia of civilian employees. It appears from the cases that they were appointed by the Secretary of the Army or Navy or the commander of the vessel on which they served, that they were paid by the Department of the Army or Navy, and that they even wore a uniform. One case specifically refers to them as officers. They appear, on the facts, to have been comparable to the present class of Department of the Army civilians, with the exception that they wore uniforms. In *re Thomas*, # 13,888, 23 Fed. Cas. 931 (DC,

Miss., 1869); *United States v. Bogart*, = 14,616, 24 Fed. Cas. 4484 (DC, N.Y., 1869); *In re Bogart*, = 1,596, 3 Fed. Cas. 796 (CC, Calif., 1873); *In re Reed*, = 11,636, 20 Fed. Cas. 409 (CC, Mass., 1879).

Another series of cases arose out of Article 2(d) of the Articles of War of 1916, 39 Stat. 651, which subjected to military court martial jurisdiction,

"All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles."

In World War I and again in World War II, military court martial jurisdiction over civilians both in the United States and overseas was upheld under the terms of this article. e.g. *Hines v. Mikell*, 259 Fed. 28 (CCA 4th, 1919), cert. den. 250 U.S. 645 (civilian auditor in South Carolina); *Ex parte Gerlach*, 247 Fed. 616 (DC, N.Y., 1917) (civilian mate on an Army transport); *Ex parte Falls*, 251 Fed. 415 (DC, N.J., 1918) (civilian cook on an army transport in New York harbor); *Ex parte Joehen*, 257 Fed. 200 (DC, Texas, 1919) (civilian superintendent of Quartermaster Corps with troops on the Mexican border); *Peristein v. United States*, 151 F. 2d 167 (CCA 3d, 1945), cert. granted, 327 U.S. 777, dismissed as moot, 328 U.S. 822 (assistant mechanical superintendant employed by private army contractor in Eritrea, Africa, in 1942); *in re DiBartolo*, 50 F. Supp. 929 (DC, N.Y., 1943) (mechanic with Douglas Aircraft Co. in Eritrea, Africa, in 1942); *McCune v. Kilpatrick*, 53 F. Supp. 80 (DC, Va., 1943) (cook on military vessel loading military supplies); *In re Berge*, 54 F. Supp. 252 (DC, Ohio, 1944) (merchant seaman on convoy vessel).

In *Grewe v. France*, 75 F. Supp. 433 (DC, Wis., 1948), the defendant had been a mechanical engineer with the Office of the Chief Engineer, U.S. Forces, European Theater, in Frankfurt, Germany, in 1946. The Court held that Article 2(d) was constitutional and that, since Germany was still

a military occupied zone and in a state of war, though hostilities had ceased, there was jurisdiction under either section of Article 2(d). This is a borderline case, but probably should be considered as one of the wartime cases. See also, *United States ex rel. Mobley v. Handy*, 176 F. 2d 491 (CCA 5th, 1949), cert. den. 338 U.S. 904, reh. den. 338 U.S. 904, reh. den. 338 U.S. 945 (civilian post exchange employee arrested in the United States to be returned to Germany for court martial).

On the other hand, a few cases have refused court martial jurisdiction when it was clear that the person attempted to be court martialed was a civilian with no relationship to the armed forces. The first of these cases was *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 107 (1866) where a civilian was arrested in Indiana and tried by a military commission for offenses against the United States committed during wartime. The Court held that there was no jurisdiction on the ground that military tribunals could not constitutionally be substituted for civil courts that were open and operating in the proper and unobstructed exercise of their jurisdiction. It should be noted that the petitioner in this case had no relationship to the military in any way.

Again, in *Ex parte Henderson*, 6,349, 11 Fed. Cas. 1067 (C.C. Ky., 1879) the Court struck down as unconstitutional a statute that attempted to confer court martial jurisdiction over a civilian contractor who furnished supplies to the army in the United States.

In only one of the group of World War I cases was military jurisdiction not upheld. In *Ex parte Weitz*, 256 Fed. 58 (DC, Mass., 1919), the defendant was a civilian chauffeur for a contractor doing construction work for the military in Massachusetts, and the Court held that his work had no "direct relation to the transport, maintenance, or supply of an army in the field," although adding that if he had been so employed and within the terms of Article 2(d) of the Articles of War, he would have been subject to court martial jurisdiction. There appears to be nothing inconsistent between this case and the cases cited above for the general proposition.

Finally, in *Dungan v. Kahanamoku*, 327 U.S. 304 (1946), the Court refused to sustain military jurisdiction over a

civilian shipfitter employed by the Navy Yard in Honolulu and over a civilian stockbroker in Honolulu who had no connection with the armed forces.

Under Article 2(11) of the Uniform Code of Military Justice, jurisdiction over civilian employees in peacetime has been directly considered in only four reported opinions, and the first of these was prior to *Reid v. Covert*, *supra*. In the first of these cases, *In re Varney's Petition*, 141 F. Supp. 190 (DC, Calif., 1956), Varney, a Department of the Army civilian in Japan who had been convicted by a general court martial, was denied relief by habeas corpus on four grounds, (1) He had not exhausted all remedies available to him in the military appellate court system. (2) He was within the express terms of Article 2(11) and therefore in a status which did not entitle him to a jury trial. (3) While voluntarily in a foreign country with the Army, he had no right to a trial by jury, on the authority of *In re Ross* (consular court) and the *Insular Cases*. (4) Congress is empowered to authorize trial by court martial of civilians associated with the land and naval forces by virtue of their power under Article I, Section 8, Clause 14, as supplemented by the Necessary and Proper Clause. The Court then reasoned that it was necessary to have jurisdiction over civilians such as the petitioner.

In *Grisham v. Taylor*, 161 F. Supp. 112 (DC, Pa., 1958) (said to be on appeal to the 3rd Circuit and due to be argued soon), petitioner was a Department of the Army civilian assigned to the Corps of Engineers, and on temporary duty in France. He was tried by a general court martial for premeditated murder and found guilty of unpremeditated murder. The Court considered Judge Hoitzhoff's opinion in *Guagliardo v. McElroy*, *infra*, the *Toth* case, *infra*, and *Reid v. Covert*, *supra*, concluding with the following holding:

"In the light of the divergent opinions in *Covert* and the self-defeating alternatives, enumerated and evaluated by Mr. Justice Harlan in *Covert* (Note 12, Page 76), I conclude, paraphrasing Mr. Justice Black, *Covert supra*, that this is a circumstance where petitioner was in the armed services for purposes of Clause

14 even though he had not been formally inducted into the military and did not wear a uniform."

The Court added to this that Article 2(11) was constitutional and that civilian employees abroad attached to the armed forces could be subjected to trial by court martial, even in capital cases.

In *United States ex rel. Guagliardo v. McElroy*, 66 158 F. Supp. 171 (DC, D.C., 1958), the petitioner was an electrical lineman employed by the Department of the Air Force in Morocco. He was tried and convicted by a general court martial for a non-capital offense. In an excellent summary of the existing state of the Supreme Court's decisions, Judge Holtzhoff summarized the holdings as follows:

"A former member of the armed forces, who has been discharged and is no longer within the control of the military, is not subject to trial by court martial for an offense committed during his term of service.

A wife, a child, or other dependent of a member of the armed forces is not subject to trial by court-martial in a capital case.

The Supreme Court has not determined whether a dependent accompanying a serviceman is subject to trial by court-martial in a case other than capital.

Similarly, the Supreme Court has never had occasion to decide whether a civilian employee attached to the armed forces in a foreign country is subject to trial by court-martial."

The Court then considered the history of the various provisions in military codes that subjected civilian employees to court martial jurisdiction. However, in denying relief to the petitioner, the Court did so on the grounds,

"That a law subjecting personnel of the type involved in this case to trial by court martial is necessary and proper for carrying into execution the power to make rules for the government and regulation of the land and naval forces, is demonstrated by a consideration of the consequences of any conclusion that would deny

this authority to the Congress. It is manifestly essential to enforce law and order at stations maintained by the armed forces of the United States in foreign countries. The use of civilian employees is frequently indispensable in connection with the operation of these stations. If court-martial jurisdiction may not be exercised in respect to such civilians, other means of law enforcement would create difficulties that in some instances might prove insuperable."

This decision was reversed by the Court of Appeals for the District of Columbia in the fourth reported opinion on this question, on the ground that the clause "employed by" was not severable from the other clause struck down in 67 Reid v. Covert. Therefore, the Court considered itself bound by the decision in Reid v. Covert, and did not consider the issue of whether civilian employees could constitutionally be subjected to court martial jurisdiction. Judge Burger entered a strong dissent on the grounds that : (1) The majority result was not compelled by Reid v. Covert, because a civilian employee could be either "in" the armed forces in accord with the Black opinion, or that he could be within the Necessary and Proper Clause as suggested by the concurring opinions. (2) There is historic precedent for subjecting civilian employees to court martial jurisdiction whereas there is none for dependents. (3) Clear necessity exists for subjecting civilian employees to court martial jurisdiction. (4) No practical alternative exists. United States ex rel. Gugliardo v. McElroy, adv. sheet, Sept. 12, 1958 (DC App., 1958), reversing 158 F. Supp. 171 (petition for certiorari said to be pending before the United States Supreme Court). The logic of this dissent is appealing; it is well reasoned and most convincing and this Court is persuaded to adopt it.

There appears to be a clear distinction between those cases sustaining jurisdiction and those denying it. When the person involved was clearly a civilian with no material relationship to the armed forces, jurisdiction has consistently been denied to the armed forces. On the other hand, when the individual concerned has had a clear relationship to the armed forces, so that he may properly be said to be part of them, jurisdiction has been upheld in all cases

except the last one cited above, where the Court voiced no opinion on the point. The Supreme Court appears to have recognized this distinction. For example, Mr. Justice

Black, in *Duncan v. Kahanamoku*, *supra*, speaking for the Court, said at page 313,

"Our question does not involve the well-established power of the military to exercise jurisdiction over members of the armed forces, *those directly connected with such forces*,⁷ or enemy belligerents, prisoners of war, or others charged with violating the laws of war." (emphasis added)

At Note 7, for the proposition underlined here, the Court cited *Ex parte Gerlach*, *supra*, *Ex parte Falls*, *supra*, *Ex parte Jochen*, *supra*, and *Hines v. Mikell*, *supra*.

Again, in *United States ex rel. Toth v. Quarles*, 350 U.S. 11, (1955), Justice Black, in the majority opinion to which five other justices subscribed, said, at page 15,

"For given its natural meaning the power granted Congress 'To make Rules' to regulate 'the land and naval forces' would seem to restrict court-martial jurisdiction to persons who are actually members *in part* of the armed forces." (emphasis added)

Finally, in the Black opinion in *Reid v. Covert*, *supra*, the learned Justice said that,

"Even if it were possible, we need not attempt here to precisely define the boundary between 'civilians' and members of the 'land and naval forces.' We recognize that there might be circumstances where a person could be 'in' the armed services for purpose of Clause 14 even though he had not formally been inducted into the military or did not wear a uniform."

The Court then added, however, that dependants were not in this class of persons who could be considered a part of the armed services. Presuming that this language has some meaning, we think it at least recognizes a distinction between those who accompany our armed forces overseas for purposes of convenience only, such as dependants, and those who are so closely aligned with the necessary functioning of our armed forces overseas that they may logically be said to be a part of those forces. This distinc-

tion, based on the relationship of the person concerned to the armed forces, runs through all the cases cited above, and we think it a valid one. Consequently, it is the opinion of this Court that petitioner here was in the armed services for purposes of jurisdiction under Article I, Section 8, Clause 14, of the Constitution.

However, even if it should be considered that the petitioner does not fall within the express terms of Clause 14 for purposes of jurisdiction, this Court is of the opinion that the result arrived at in this case is equally sustainable on other grounds. The parties here are also at issue on the question of whether jurisdiction over a civilian employee overseas can be sustained by virtue of the necessary and proper clause of the Constitution, irrespective of whether that same person is within the terms of Clause 14. This, of course, resolves itself to the issue of whether the necessary and proper clause modifies or extends Clause 14.

First, it should be noted that the Supreme Court in *Reid v. Covert* was equally divided on this question. The four justices in the Black opinion agreed that

“... the Necessary and Proper Clause cannot operate to extend military jurisdiction to any group of persons beyond that class described in Clause 14—‘the land and naval Forces.’”

On the other hand, Justice Frankfurter expressed the opinion that the Necessary and Proper Clause was an integral part of Clause 14, and that Congress could therefore sweep in whatever was necessary to make effective the express power of Clause 14. Justice Harlan also disagreed with the Black opinion on this point, and agreed with Justice Frankfurter that the Necessary and Proper Clause was to be taken with Clause 14 and could be used to expand it. The dissent also assumed this to be true, and devoted itself almost entirely to a consideration of whether Article 2(11) was reasonably necessary to the power given Congress by Clause 14.

This Court is disposed to follow the view that the Necessary and Proper Clause does give Congress power to enact whatever legislation is necessary for the effective government and regulation of our armed forces. This view has been adopted by the other courts that have

considered the question, and it has previously been assumed to be settled law that the Necessary and Proper Clause, as stated by Justice Harlan in *Reid v. Covert*, "is to be read with *all* the powers of Congress." See e.g. *United States ex rel. Guagliardo v. McElroy*, *supra*, at page 178; *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 315 (1819).

The final issue for determination then is whether jurisdiction over civilian employees of the armed forces overseas is necessary for the government and regulation of those armed forces.

Since World War II the troubled international situation has made it necessary for the United States to deploy its armed forces throughout the World, and not infrequently in remote and isolated areas. These forces include a large number of civilian employees, many of whom are technicians and specialists in the fields of electronics, rocketry, atomic energy, aircraft and aircraft weapons. Their relationship to the effective functioning of our armed forces is well known. It is seriously doubted if many of these civilian employees could be replaced by uniformed soldiers, sailors or airmen capable of carrying out the assigned tasks.

In many instances these civilians may very well possess some of this nation's highest and most guarded secrets which are necessary to their employment and to the defense of the free world. Obviously, the military commander must have means to insure control of civilian employees not only for the most effective utilization of their skill, but also to insure the proper utilization and protection of highly classified security information they may possess.

71 The military commander has the primary responsibility of maintaining armed forces in a state of combat readiness to meet any eventuality. He has the further responsibility of operating his military community in such a way as to give the best possible impression of the United States to the people in foreign areas. To discharge these responsibilities the commander must have some control over the activities of his charges both uniformed and non-uniformed. These civilian employees usually enjoy the privileges and benefits received by the military; and nearly every essential of their daily living and activities is interwoven with those of the military. Considered realistically, these civilian employees are a part of our

armed forces overseas. The question here is not simply whether military or Article III civil courts should have jurisdiction. In many cases, if not in all cases, the realities of the situation reduce it to a question of whether anyone should have jurisdiction. A variety of alternatives to military jurisdiction have been proposed and fully considered. See e.g. Note 12 on page 76 of Justice Harlan's opinion in *Reid v. Covert*; 74 *Harvard Law Review* 712. None have been found or even proposed that are wholly satisfactory and serious doubt exists that any of them would work at all. Even if certain alternative solutions were available in certain situations, such as trial in a civil court, these solutions would seriously diminish a local commander's effectiveness in maintaining law and order on his post, and could even greatly lessen the security of the post itself. Without the power of disciplinary action over these civilians the commander's efforts to successfully fulfill his mission in a foreign land would be seriously impaired.

72 Certainly it cannot be said that these considerations are irrelevant in determining whether jurisdiction over civilian employees overseas is necessary to the effective government and regulation of our armed forces. Therefore, it is the conclusion of this Court that Congress may, under the authority of the Necessary and Proper Clause, provide for court-martial jurisdiction in non-capital cases over others than uniformed members of our armed forces when necessary for the effective government and regulation of those armed forces. It is also the conclusion of this Court that court martial jurisdiction in non-capital cases over civilian employees of the armed forces in foreign lands is necessary for the effective government and regulation of our armed forces.

The Order to show cause is discharged and the petition is dismissed.

Dated at Denver, Colorado, this 13th day of November, A. D. 1958.

By the Court:

ALFRED A. ARRAG

Alfred A. Arraj

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil No. 6161

(File Endorsement Omitted)

Notice of Appeal—Filed Dec. 2, 1958

Notice is hereby given that Bruce Wilson, the petitioner above named, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the Memorandum Opinion and Order entered in this action on November 10, 1958.

Major General John F. Bohlander, Commander, Fitzsimons Army Hospital, Denver, Colorado, is designated as the appellee.

ARTHUR JOHN KEEFE

GEORGE J. NOUMAIR

WILLIAM C. MCCLEARN

William C. McClearn

520 Equitable Building

Denver 2, Colorado

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Attorneys for Petitioner Appellant

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH JUDICIAL CIRCUIT

Sitting at Denver, Colorado

Twenty-Second Day, November Term, Tuesday,
December 23rd 1958

PRESENT: Honorable Jean S. Breitenstein, Circuit Judge,
And other officers as noted on the 17th day of November, 1958.

Before HONORABLE SAM G. BRATTON, *Chief Judge*.

BRUCE WILSON, *Appellant*,

6063

vs.

MAJOR GENERAL JOHN F. BOHLANDER, Commander,
Fitzsimmons Army Hospital, *Appellee*.

Appeal from the United States District Court
for the District of Colorado

This cause came on to be heard on the application of appellant for leave to docket the cause as a poor person; that a copy of the certified transcript of the record from the United States District Court be certified to the Supreme Court of the United States, together with petitioner's exhibit 1, duly certified; and that further action here in be held in abeyance.

On consideration whereof, and for good cause shown, it is ordered that said application be granted and the same is hereby granted and that appellant may docket the cause instantaneously without being required to prepay fees or costs or to give security therefor.

It is further ordered that the clerk of this court transmit to the Supreme Court of the United States a certified copy of the record from the United States District Court for the District of Colorado, together with petitioner's exhibit 1, duly certified; and that further action by this court be held in abeyance.

It is further ordered that the clerk of this court forthwith transmit to the clerk of the Supreme Court of the United States a certified copy of this order.

A true copy as of record,

United States Court of Appeals, Tenth Circuit.

I, Robert B. Cartwright, do hereby certify the foregoing as a full, true and complete copy of the transcript of record from the United States District Court for the District of Colorado had and filed in the United States Court of Appeals for the Tenth Circuit, in a certain cause, No. 6063, wherein Bruce Wilson is appellant, and Major General John F. Bohlander, Commander Fitzsimmons Army Hospital, is appellee, as full, true and complete as the original transcript of record remains on file in my office.

I do further certify that no action has been taken in said cause by the United States Court of Appeals for the Tenth Circuit, other than the entry of an order docketing the cause in forma pauperis.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Court of Appeals for the Tenth Circuit, at my office in Denver, Colorado, this 23rd day of December, A. D. 1958:

ROBERT B. CARTWRIGHT,
*Clerk of the United States
Court of Appeals, Tenth
Circuit.*

By GEORGE A. PEASE
Chief Deputy Clerk.

**Order Granting Motion for Leave to Proceed In Forma
Pauperis and Petition for Certiorari—Feb: 24, 1959**

On petition for writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 725, placed on the summary

calendar and assigned for argument immediately following No. 571.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

February 24, 1959

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In the Supreme Court of the United States

OCTOBER TERM, 1937

**NEIL H. McELROY, SECRETARY OF DEFENSE, ET AL.,
PETITIONERS**

v.

**UNITED STATES OF AMERICA, EX REL. DOMINIC
GUAGLIARDO**

**PETITION FOR A WRIT OF HABEAS CORPUS TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

J. LEE RANKIN,

Solicitor General,

W. WILSON WHITE,

Assistant Attorney General,

HAROLD M. GREENE,

WILLIAM A. KERR, JR.,

Attorneys,

Department of Justice, Washington 25, D. C.

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Maltby, *Courts-Martial and Military Law* (1813),

p. 31

Winthrop, *Military Law and Precedents* (2d ed., 1920)

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. —

NEIL H. McELROY, SECRETARY OF DEFENSE, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA, EX REL. DOMINIC
GUAGLIARDO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, in behalf of Neil H. McElroy, Secretary of Defense, James H. Douglas, Secretary of the Air Force, and General Thomas D. White, Chief of Staff, United States Air Force, hereby petitions that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the District Court was filed January 13, 1958, and is reported at 158 F. Supp. 171; it is set forth in Appendix A, *infra*, pp. 18-33. The opinions of the Court of Appeals have not yet been reported; they are set forth in Appendix B, *infra*, pp. 34-61.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on September 12, 1958, Appendix B, *infra*, pp. 61-62. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether a person employed by and serving with the United States Air Force outside the continental limits of the United States can, under Article 2 (11) of the Uniform Code of Military Justice, be constitutionally prosecuted, convicted, and punished by court-martial overseas for the commission of a non-capital offense committed overseas.

2. Whether, in view of the decision in *Reid v. Covert*, 354 U. S. 1, Article 2 (11) of the Uniform Code of Military Justice can now be read as severably authorizing the court-martial of persons employed by and serving with the armed forces overseas who commit non-capital offenses abroad.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

The following provisions of the Constitution are involved:

Article I, Section 8. The Congress shall have
Power * * *

Clause 14. To make Rules for the Government and Regulation of the land and naval Forces. * * *

Clause 18. To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other

Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Article 2 of the Uniform Code of Military Justice, 64 Stat. 109, as codified in 70A Stat. 37, 10 U. S. C. (Supp. V) 802, provides in pertinent part:

Art. 2 The following persons are subject to this chapter: * * *

(11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States and outside the following: that part of Alaska east of longitude 172 degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands.

STATEMENT

The respondent is a citizen of the United States. He was employed in March 1954 by the United States Air Force at Nouasseur Air Depot, Morocco, as an electrical lineman. His duties consisted of maintaining and repairing air field lighting, and inspecting and repairing electrical conducts, transformers, lights, controls, ducts and manholes (R. 22).¹

Respondent was not furnished with living quarters on the base, but lived with his wife in an apartment in Casablanca, Morocco (R. 28). He was entitled to quarters' allowance, mail, commissary and base exchange privileges, a United States Air Force (Europe) ration card, membership in the Air Force Officer's Club, and medical and dental care (R. 28).

¹ Record references are to the original record which has been filed herein.

He was paid \$506.88 per month by the Department of the Air Force (R. 29).

On July 18, 1957, respondent and two enlisted members of the Air Force, stationed at the Nouasseur Air Depot, were charged with committing larceny in violation of Article 121 of the Uniform Code of Military Justice, 10 U. S. C. 921 (Supp. V). They were accused of stealing leatherette goods and olive drab material having a value of \$4,690.00, at Nouasseur Air Depot. They were also charged with a violation of Article 81 of the Uniform Code of Military Justice, 10 U. S. C. 881 (Supp. V) in that they conspired with each other to commit the offense of larceny under the Code (R. 23). Respondent and his co-defendants were informed of these court-martial charges against them on July 18, 1957, and on August 14, 1957, the charges were referred for a trial to a general court-martial convened by the Commander, Southern Material Area, Europe (R. 23).

After a four-day trial by general court-martial in Morocco, respondent and his co-defendants were found guilty as charged, except that the value of the stolen goods was found to be more than \$50.00, rather than the \$4,690.00 charged (R. 23). Respondent was sentenced to pay a fine of \$1,000.00 and to be confined at hard labor for three years (R. 24). Upon review by the convening authority, the finding of guilty of larceny was disapproved because of an instructional deficiency, but the sentence as imposed was otherwise approved ^{1a} (R. 24).

^{1a} A Board of Review, in the Office of the Judge Advocate General, Air Force approved the findings of guilty but reduced

On December 2, 1957, respondent filed in the United States District Court for the District of Columbia a petition for writ of habeas corpus in which it was alleged, *inter alia*, that the military authorities lacked jurisdiction to try him and that his confinement under sentence of court-martial was unlawful (R. 1). At the time the petition was filed, he was confined in the Base Stockade, Nouasseur Air Depot, Morocco (R. 1). Subsequent to the filing of the petition in the District Court, respondent was transferred to the U. S. Disciplinary Barracks, New Cumberland, Pennsylvania, on January 8, 1957 (R. 46).

After hearing, the District Court concluded that civilian employees attached to the armed forces of the United States abroad may lawfully be subjected to trial by court-martial, held that respondent was not illegally detained of his liberty, and dismissed the petition (Appendix A, *infra*, pp. 32-33). The Court of Appeals for the District of Columbia Circuit reversed, one judge dissenting, and ordered respondent discharged from custody (Appendix B, *infra*, pp. 34-61). Respondent was admitted to bail pending appeal, pursuant to an order of the Court of Appeals.²

the sentence to a two year confinement. See footnote 2, *infra*.

² During the course of this proceeding in the courts below, respondent and his co-defendants prosecuted administrative review of their trial and conviction before a Board of Review, pursuant to the applicable provision of the Uniform Code of Military Justice (Article 66, *et seq.*, 10 U. S. C. (Supp. V) 867, *et seq.*), see footnote 1a, *supra*, p. 4. Administrative appeals were exhausted. See the Opinion of the Court of Appeals, Appendix B, *infra*, p. 45, fn. 8, and Article 67, 10 U. S. C. (Supp. V) 867. In the courts below, petitioners had urged that this

REASONS FOR GRANTING THE WRIT

The questions presented are important matters of first impression in this Court, on which there is now a conflict among the courts of appeals. The basic issue is whether, within the framework of the Uniform Code of Military Justice, a person employed by the armed services at an overseas military installation may still be tried by court-martial for a violation of a non-capital offense against the Code.

1. This question is an open one. Recently the Court was confronted with the problem of courts-martial jurisdiction over "civilians" on two occasions, but neither ruling controls here. In *Toth v. Quarles*, 350 U. S. 11, the issue was whether a civilian who had been honorably discharged from the Air Force, and who had severed all connection with the military service, could thereafter be constitutionally tried by court-martial for an offense committed while in the service. That question, which the Court answered negatively, is plainly different from the issue now raised respecting trials of employees serving with the forces overseas.

In *Reid v. Covert*, 354 U. S. 1, the Court decided that dependents of military personnel who commit capital offenses in foreign countries cannot constitutionally be tried by courts-martial. The opinions in-

proceeding was brought prematurely because respondent had not exhausted all proceedings available to him before the military tribunals. See *Gusik v. Schilder*, 340 U. S. 128. In view of the fact that these proceedings have been exhausted during the pendency of the judicial review and respondent's conviction and sentence have been finally affirmed, this point appears to have been mooted and is not raised or pressed in this Court.

dicates that the question of military trial in non-capital cases of other persons covered by Article 2 (11)—more particularly, of military trial for offenses committed by persons employed by the armed forces overseas—was carefully left open by the Court. The Court of Appeals in the instant case, also construing Article 2 (11), determined that the portions of the Article dealing with persons “serving with” and “employed by” the armed services were not severable from the category of persons “accompanying” the armed services which this Court construed in *Covert*, and that the category of capital offenses could not be distinguished from non-capital crimes. But the opinion of Mr. Justice Black, in which the Chief Justice, and Justices Douglas and Brennan concurred, stated (354 U. S. at 22):

Even if it were possible, we need not attempt here to precisely define the boundary between ‘civilians’ and members of the ‘land and naval Forces’. We recognize that there might be circumstances where a person could be ‘in’ the armed services for purposes of Clause 14 even though he had not formally been inducted into the military or did not wear a uniform.

And the concurrence of Mr. Justice Frankfurter was explicitly limited (354 U. S. at 45):

The Court has not before it, and therefore I need not intimate any opinion on, situations involving civilians, in the sense of persons not having a military status other than dependents. Nor do we have before us a case involving a non-capital crime.

See also the concurrence of Mr. Justice Harlan, 354 U. S. at 75.

In short, the reading of Article 2 (11) by the majority of the Court of Appeals in this case cannot be derived from the careful treatment of this same Article in *Covert*. For this Court would hardly have found it necessary to hand down so deliberately restricted a ruling if in reality it could be said, as the Court of Appeals evidently felt, that the entire Article forms one indivisible whole. This Court decided only the issue of court-martial trials for dependents in capital cases.³

2. The ruling of the Court of Appeals here is in direct conflict with the recent decision of the Court of Appeals for the Third Circuit in *Grisham v. Taylor, Warden*, No. 12630, decided November 20, 1958.⁴ The *Grisham* case involves the same problem of an overseas court-martial trial of an employee of the armed forces, and in one respect (the gravity of the offense) is more unfavorable to the Government's position than is the present case. The *Grisham* court stated the issue as follows (Appendix C, *infra*, p. 66):

So we are confronted with the problem of the application of the *Covert* case to a civilian employee of the armed forces serving abroad,

³ As the two concurring opinions in *Covert* indicate, more was involved than the usual reluctance of the Court to decide questions not necessary to a decision in the case before it. If the majority of the Court of Appeals were correct with respect to non-severability, much of what was said by the concurring Justices would be rendered nugatory.

⁴ The *Grisham* opinion is set forth in Appendix C, *infra*, pp. 63-68.

prosecuted for a capital offense in peacetime and tried by court-martial. Grisham was charged in France with premeditated murder, a capital offense. The conviction was for unpremeditated murder which is not a capital offense.

Upon consideration of all the factors, including the decision of the District of Columbia Circuit in the instant case with which it disagreed (Appendix C, *infra*, p. 65), the Third Circuit held that employees of the armed forces overseas are so closely connected with those forces that the military have jurisdiction over them, and can constitutionally try them by courts-martial even for unpremeditated murder.

Subsequent to this Court's opinions in *Covert*, the United States Court of Military Appeals has also held on two occasions that court-martial jurisdiction can be exercised over employees of the armed forces. *United States v. Dyer*, 9 U. S. C. M. A. 64, 25 C. M. R. 326; *United States v. Wilson*, 9 U. S. C. M. A. 60, 25 C. M. R. 322. And the United States District Court for the District of Colorado in *United States ex rel. Wilson v. Bohlender*, Civil No. 6161, in an opinion dated November 10, 1958, has likewise held that the military have jurisdiction over a civilian employee who commits an offense against the Uniform Code while employed by the Army overseas.

3. It is our position that the Third Circuit and the Court of Military Appeals are correct, and that the court below has erred. Respondent was "in" the Air Force for the purposes of court-martial jurisdiction even though he did not wear its uniform.

(a). From the point of view of statutory authority,

respondent is clearly covered by Article 2 (11); as a person "employed by * * * the armed forces outside the United States. * * *," *supra*, p. 3, he was subject to the trial procedures set up under the Uniform Code of Military Justice. The Uniform Code contains a very broad severability clause (Section 49 (d) of the Act of August 10, 1956, 70A Stat. 640, Appendix C, *infra*, p. 65), and under established principles of statutory construction the *Covert* ruling as to dependents did not carry with it the rest of Article 2 (11).

(b). Under Article 1, Section 8, Clause 14 of the Constitution, Congress is empowered "To make Rules for the Government and Regulation of the land and naval Forces." By Clause 18, it is also empowered "To make all Laws which shall be necessary and proper for carrying into Execution * * *" this power. The basis of the governmental power being asserted against respondent is power under these constitutional provisions, asserted by virtue of his employment by, and close contact with, the uniformed military. The respondent was an integral part of the military installation of Nouasseur Air Depot, Morocco. He worked side by side with military personnel; he worked on military equipment; his superiors were uniformed officers. He was entitled to and received benefits which were available to him only because of his affinity by employment with the military, such as membership in the officer's club, a ration card, use of the base commissary, and medical and dental care. His very job as a lineman on the overseas air base was itself a truly military function.

The fact is that persons who are employed in the armed forces overseas are not in a meaningful sense "civilians" for whom the trial protections of Article III, and the Fifth and Sixth Amendments were intended and should be applied.⁵ The Court's opinion in *Toth* indicated that "the primary business of armies and navies [is] to fight or be ready to fight wars should the occasion arise" and the "trial of soldiers to maintain discipline is merely incidental to an army's primary fighting function" (350 U. S. at p. 17). It is in this respect that the Congressional mandate directing that persons employed by the armed services at overseas installations be subject to military justice has its greatest importance. For while it may be "merely incidental" to an army's principal function to be able to try persons in or connected with the military so as to maintain discipline, this incidental function is still a basic and significant one. Without the ability to maintain law and order in a foreign land, an army would be powerless to fulfill its first obligation of fighting or being able to fight. Without discipline and a system for maintaining equal justice, military effectiveness would be seriously impaired.

In the context of an overseas military installation, and in order to have an effective system of discipline, justice must be uniform. Employees who serve with troops overseas, who are subject to the same military authority, who live their daily lives with the uni-

⁵ This assumes that a practical method of Article III trial could be devised for persons stationed overseas charged with non-capital offenses, rather than a trial under foreign law.

formed personnel, who are engaged and trained to form a single cohesive organization with servicemen, and who are quasi-permanently on foreign soil without becoming a part of the foreign nation simply because they are of the military contingent, should be subject to the rules and regulations which are promulgated to govern the entire military community abroad.

The present case illustrates the problem. If the ruling of the Court of Appeals stands, we would have the anomalous situation of two out of three co-conspirators standing convicted and punished because they wore uniforms, and the third conspirator, the respondent here, going unpunished, despite the fact that he was equally guilty of the acts charged and equally an integral part of the Air Force military base in Morocco. All three defendants were members of the same military installation; they had the same commanding officer; they had practically identical rights and privileges at the installation. No distinction is normally drawn between uniformed soldiers and employees at the military base by the people of the host country. Likewise, it is fair to say that employees in respondent's position generally consider themselves to be fully a part of the military contingent abroad. They are "in" the armed forces even though they have not been formally inducted and do not wear a uniform.

(c). Historically, civilian employees of the class to which respondent belongs, serving with the armed forces in the field, have been deemed subject to military jurisdiction. In *Duncan v. Kahanamoku*, 327

U. S. 304, 313, this Court recognized "the well-established power of the military to exercise jurisdiction over members of the armed forces, [and] those directly connected with such forces", and cited the cases of *Ex parte Gerlach*, 247 Fed. 616 (S. D. N. Y. 1917); *Ex parte Falls*, 251 Fed. 415 (D. N. J. 1918); *Ex parte Jochen*, 257 Fed. 200 (S. D. Tex. 1919); *Hines v. Mikell*, 259 Fed. 28 (C. A. 4), certiorari denied, 250 U. S. 645.⁶ This same jurisdiction has been sustained in time of peace. *In re Varney*, 141 F. Supp. 190 (S. D. Cal.). In each of these cases the District Court dismissed petitions for habeas corpus and sustained the constitutional right of the military to try persons who were not soldiers but who were serving with or were employed by the military forces. Jurisdiction to try the petitioners by court-martial was asserted under an Article of War then in force which is practically identical with Article 2 (11) of the Uniform Code.

Provision for trial of "civilians" serving with the forces goes far back in Anglo-American history.⁷ For instance, Article 31st of the Massachusetts Articles of War, adopted on April 5, 1775, provided:

⁶ The authority exercised in these cases was exercised under Clause 14 under which Congress has authority to govern and regulate the armed forces, not under the "war powers". See *Ex parte Quirin*, 317 U. S. 1.

⁷ See Brief for Appellant, *Reid v. Covert*, No. 701, Oct. Term, 1955, pp. 32-34; Supplemental Brief for Appellant and Petitioner on Rehearing, *Reid v. Covert*, No. 701, Oct. Term, 1955, *Kinsella v. Krueger*, No. 713, Oct. Term, 1955, pp. 76-80; Reply Brief for Appellant and Petitioner on Rehearing, *Reid v. Covert*, No. 701, Oct. Term, 1955, *Kinsella v. Krueger*, No. 713, Oct. Term, 1955, pp. 37ff.

All sellers and retailers to a camp, and all persons whatsoever serving with the Massachusetts Army in the field, though not enlisted Soldiers, are to be subject to the Articles, Rules and Regulations of the Massachusetts Army. [Winthrop, *Military Law and Precedents*, 2d ed. (1920), p. 950.]

In addition, there were five other Articles of the Massachusetts Articles of War which provided for the trial and punishment, including the death penalty, by court-martial of civilians serving with the army.

Prior to the Revolution, the British had adopted the Articles of War of 1765 which placed civilians connected with the Army under military discipline. (Winthrop, *id.* at p. 941). The American Revolutionary Army was governed by similar provisions under Articles of War adopted by the Continental Congress on June 30, 1775. Journals of Continental Congress, Vol. II, 1775, p. 116. Article XLVIII of these Articles provide:

All officers, conductors, gunners, matrosses, drivers or any other persons whatsoever, receiving pay or hire, in the service of the continental artillery, shall be governed by the aforesaid rules and articles, and shall be subject to be tried by courts-martial, in like manner with the officers and soldiers of the Continental troops. [Winthrop, *id.* at p. 957.]

The importance of that 1775 provision becomes apparent when it is considered that at the time of the Revolution artillerymen, and more particularly the drivers of the wagons and caissons, were not soldiers or uniformed troops but were civilian experts. *Encyclopedia Britannica*, Vol. 8, p. 448; *Encyclopedia*

Americana, Vol. 2, p. 364. Article XLVIII of the 1775 Articles also illustrates the difference in the powers granted to Congress in Article 1, Section 8, clause 12, "to raise and support Armies", and clause 13, "to provide and maintain a Navy", when contrasted with its power to govern and regulate "the land and naval Forces." *Forces* may well be broader in scope than "armies" which might be said to include only soldiers and officers. See Maltby, *Courts-Martial and Military Law* (1813), p. 31.

The Articles of War enacted by Congress for the government of the army, subsequent to the adoption of the Constitution, have invariably applied court-martial jurisdiction to civilian employees serving with the army in the field. Article 60 of the Articles of War enacted April 10, 1806, contained such a provision, 2 Stat. 366, and similar provision was made in the revision of 1874, Rev. Stat. (2d ed. 1878), p. 236 (Article 63). Similar authority was conferred in all subsequent reenactments and revisions—in 1916, 39 Stat. 651; 1920, 41 Stat. 787; and in the adoption of the Uniform Code of Military Justice, 64 Stat. 109, codified in 70A Stat. 37, 10 U. S. C. (Supp. V) 802 (11).

4. The problem posed by this case is not confined to this respondent nor is it restricted even to as small a group as was affected by the decision of this Court in *Covert*. As was indicated in the Reply Brief for Appellant and Petitioner on Rehearing in Nos. 701 and 713, Oct. Term, 1955 (*Reid v. Covert*, and *Kinsella v. Krueger*), pp. 62-63, 100, over 20,000 (as of Decem-

ber 31, 1956) American civilian employees were serving with the American armed forces in a number of foreign countries.* The number of violations of law which might be committed by such a group can, of course, only be estimated. But in any event it is clear that the question of jurisdiction over these persons is one of great importance, not only to the government and regulation of the land and naval forces of the United States, but also to the foreign relations of this nation with the countries in which these civilian employees are stationed.

In view of the conflict in the decisions of the lower courts, it is now impossible to determine under what system of justice these persons are to be held accountable for any misdeeds they may commit. On so significant an issue, involving as it does a question of constitutional rights and powers, a definitive decision by this Court is essential.

* Our foreign treaty obligations commit to the American Military Commander the entire responsibility for the conduct of this class of personnel. This is one of the reasons for exercise of Congressional power in enacting Article 2 (11). It is noteworthy, for example, that Congress has recently exempted from the penalty provisions of the Federal Aviation Act not only uniformed personnel, but certain civilian employees of the Department of Defense because such employees are subject to the Uniform Code of Military Justice. Pub. Law 85-726, Sec. 901 (a), August 23, 1958, 85th Cong. 2d Sess.

CONCLUSION

For these reasons, it is respectfully submitted that the petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit should be granted.⁹

J. LEE RANKIN,
Solicitor General.

W. WILSON WHITE,
Assistant Attorney General:

HAROLD H. GREENE,
WILLIAM A. KEHOE, JR.,
Attorneys.

DECEMBER 1958.

⁹ There is being filed simultaneously herewith a Jurisdictional Statement in the case of *Kinsella v. United States, ex rel. Singleton*, on direct appeal from the United States District Court for the Southern District of West Virginia, pursuant to the provisions of 28 U. S. C. 1252. That case involves the question of whether a soldier's spouse who accompanied her husband overseas is constitutionally amenable to trial by court-martial for the commission of a non-capital offense in violation of the Uniform Code of Military Justice.

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Habeas Corpus No. 123-57

UNITED STATES OF AMERICA EX REL. DOMINIC
GUAGLIARDO, PETITIONER

v.

NEIL H. McELROY, SECRETARY OF DEFENSE, ET AL.,
RESPONDENTS

OPINION

Irwin Geiger, Esq., and Michael A. Schuchat, Esq., both of Washington, D. C., for the petitioner.

Oliver Gasch, Esq., United States Attorney; Edward F. Troxell, Esq., Principal Assistant United States Attorney; and John W. Kern III, Esq., Assistant United States Attorney, all of Washington, D. C., for the respondents.

The question presented in this *habeas corpus* proceeding, is whether a civilian employee attached to the armed forces of the United States stationed in a foreign country, is subject to trial by court-martial for an offense connected with his activities.

The issue arises on a return to an order to show cause granted in response to a petition for a writ of *habeas corpus* filed by a prisoner confined at an Air Depot in Morocco, against the Secretary of Defense,

the Secretary of the Air Force, and the Chief of Staff of the United States Air Force. The petitioner, Dominic Gaagliardo, was employed by the Department of the Air Force as an electrical lineman at Nouasseur Air Depot, Morocco. On July 18, 1957, he was charged with larceny of Government property consisting of leatherette goods and olive drab fabric material, valued at about \$4,690. In addition, he and two other persons were charged with conspiracy to commit larceny. He was tried and convicted by a general court-martial convened at the Air Depot and was sentenced to confinement at hard labor for three years and a fine of \$1,000. The convening authority disapproved the finding of guilty on the first of the two charges, but approved the sentence as to the second charge. The petitioner is now a prisoner at the Base Stockade, at the above mentioned Air Depot in Morocco. The matter still remains to be considered by the Board of Review of the Office of the Judge Advocate General, as well as by the Judge Advocate General. If after going through these channels the sentence is approved, the petitioner will still have the right to petition the United States Court of Military Appeals for a review of any alleged error of law.

The petitioner has applied to this court for a writ of *habeas corpus* on the ground that he had been deprived of his constitutional rights to indictment by a grand jury and trial by jury. The respondents filed a return and answer setting forth the prior proceedings in detail and asserting that civilian employees who accompany or serve with the armed forces of the United States in the field, are subject to trial by court-martial. A traverse to the return has been filed by counsel for the petitioner. The matter was heard on the petition, the return and the traverse.

In limine the respondents interposed the objection that the petitioner had not exhausted all the remedies available to him before military tribunals and that, therefore, this proceeding has been brought prematurely. This contention would be completely sustained by *Gusik v. Schilder*, 340 U. S. 128, if that case stood alone. Subsequent decisions of the Supreme Court, however, throw a different light on this question.

The case of *Toth* is illuminating in this connection. *Toth* had served in the Air Force in Korea. After he was discharged from the service, he returned to his home in Pittsburgh, and resumed his civilian occupation. He was later arrested by the Air Force police and transported to Korea for trial by court-martial on a charge of murder alleged to have been committed while he was in the service. The District Court for the District of Columbia issued and sustained a writ of *habeas corpus*, and discharged *Toth* on the ground that the Uniform Code of Military Justice did not authorize the removal of a civilian to a distant point for trial by court-martial.¹ The court expressly stated that the objection to the jurisdiction of the court-martial to try *Toth*, based on constitutional grounds, was premature. The Court of Appeals for the District of Columbia Circuit reversed the order of the District Court.² On certiorari the Supreme Court reversed the decision of the Court of Appeals and reinstated the action of the District Court.³ The Supreme Court, however, did not confine itself to passing on the narrow point on which the District Court predicated its decision, but held broadly that Congress lacked power to authorize trial by court-martial of a person in the position of *Toth*. This conclusion was reached

¹ *Toth v. Talbott*, 114 F. Supp. 468.

² *Talbott v. United States ex rel. Toth*, 94 U. S. App. D. C. 28.

³ *United States ex rel. Toth v. Quarles*, 350 U. S. 11.

in spite of the fact that Toth had made no effort to exhaust his remedies within the military system.

In *Reid v. Covert*, 354 U. S. 1, 4, the Supreme Court held that there was no constitutional authority to try the respondent by court-martial and directed that she be released from custody, in spite of the fact that she had not exhausted her remedies in the military system. As appears from the opinion of the court, a re-trial by court-martial as a result of a reversal of the conviction by the Court of Military Appeals was pending when the case was argued and decided by the Supreme Court. To be sure, it does not appear that the objection that there was a failure to exhaust prior remedies was urged by the Government in either of these cases. Nevertheless, it could have been raised by the Court *sua sponte*. It would not be appropriate for this court to assume that in spite of its decision in the *Gusik* case, *supra*, the Supreme Court overlooked the point in the *Toth* and *Reid* cases. That this matter was not mentioned in either opinion, may be due merely to the fact that the Court did not consider it worthy of discussion. This court cannot reasonably reach any conclusion other than that the *Gusik* case has been overruled *sub silentio* by the *Toth* and *Reid* cases, insofar as it applies to the necessity of exhausting other available remedies in a case in which the jurisdiction of a court-martial is challenged on constitutional grounds. Consequently, the objection that the petitioner has failed to exhaust all of his remedies within the military system is overruled.

This brings us to a consideration of the merits. Jurisdiction of courts-martial over the person of the petitioner in this proceeding is predicated on Article 2 of the Uniform Code of Military Justice (form-

erly 50 U. S. C. § 552; now 10 U. S. C. § 802), the pertinent provisions of which are as follows:

“The following persons are subject to this chapter:

* * * * *

“(11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, *persons serving with, employed by, or accompanying the armed forces outside the United States* and outside the following: that part of Alaska east of longitude 172 degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands.” (Emphasis supplied.)

It is contended by the petitioner that subsection (11), insofar as it is applicable to civilians, is unconstitutional in that it deprives them of the right not [to] be prosecuted for a criminal offense except by indictment by a grand jury, and of the right to trial by jury.

The pertinent constitutional provisions are the following:

Article I, Section 8, Clause 14:

“The Congress shall have Power * * * To make Rules for the Government and Regulation of the land and naval forces;”

Article III, Section 2, Clause 3:

“The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury: and such Trial shall be held in the State where the said Crimes shall have been committed: but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.”

The Fifth Amendment, Clause 1:

“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury,

except in cases arising in the land or naval forces, * * *

The Sixth Amendment, Clause 1:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, * * *

It is well established beyond the necessity of discussion that the power of the Congress to make rules for the government and regulation of the land and naval forces, includes the authority to provide for trials by courts-martial, and that in cases cognizable by military tribunals, neither the right to indictment by grand jury as a basis for a prosecution, nor the right to a trial by jury is applicable.* The ultimate question to be decided in connection with the resolution of the constitutional issue in this case, is to what groups of persons may the Congress extend court-martial jurisdiction. More specifically, the query is whether for the purposes of Article I, Section 8, Clause 14, the phrase, "land and naval forces", is to be limited to commissioned and enlisted personnel in uniform, or whether it may include civilian employees who are attached to the land or naval forces and perform duties in connection with their maintenance or operation.

A consideration of this topic should properly begin with a scrutiny of the rulings of the Supreme Court in this field. In making such an analysis, we must be guided by the precepts enunciated by Chief Justice Marshall in *Cohens v. Virginia*, 6 Wheat. 264, 399-400:

"It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those

* *Ex parte Milligan*, 4 Wall. 2, 123. *Ex parte Quirin*, 317 U. S. 1, 40. *Whelchel v. McDonald*, 340 U. S. 122, 127.

expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

Our attention must be directed to two cases. In *United States ex rel. Toth v. Quarles*, 350 U. S. 11, it was held that a former member of the armed forces who had been discharged from the service and was no longer within the control of the armed forces, was not subject to trial by court-martial for an offense committed during his term of service.

Reid v. Covert, 354 U. S. 1, involved the status of a wife of a member of the armed forces of the United States, who accompanied her husband while he was stationed on foreign soil. This case was heard and decided by eight members of the Supreme Court, as Mr. Justice Whittaker did not participate. Mr. Justice Black delivered an opinion in which the Chief Justice, Mr. Justice Douglas and Mr. Justice Brennan joined, and in which the view was expressed that civilian wives, children, and other dependents of members of the armed forces, could not be constitutionally subjected to trial by court-martial, since they could not be regarded as any part of the armed forces. It must be emphasized that this conclusion was reached by only four members of the Court. Mr. Justice Frankfurter and Mr. Justice Harlan wrote separate opinions concurring in the result, but limiting their conclusion to the view that in capital cases civilian dependents of members of the armed forces could not

be constitutionally tried by court-martial. Mr. Justice Clark, with whom Mr. Justice Burton joined, wrote a dissenting opinion. Consequently, the only point on which a majority of the justices concurred is that in a capital case a civilian dependent of a member of the armed forces may not be tried by court-martial. Six Justices joined in that view.

The state of the Supreme Court's decisions on this question may, therefore, be summarized as follows:

A former member of the armed forces, who has been discharged and is no longer within the control of the military, is not subject to trial by court-martial for an offense committed during his term of service.

A wife, a child, or other dependent of a member of the armed forces is not subject to trial by court-martial in a capital case.

The Supreme Court has not determined whether a dependent accompanying a service man is subject to trial by court-martial in a case other than capital.

Similarly, the Supreme Court has never had occasion to decide whether a civilian employee attached to the armed forces in a foreign country, is subject to trial by court-martial.

Obviously, the position of civilian employees is not only different in fact, but distinct in principle from that of members of service men's families. The use of civilian employees is necessary and sometimes indispensable for the operation of the armed forces. To that extent they may be deemed part of the armed forces. This is not the case with families of service men. The families are present for the mutual comfort and happiness of the military personnel and their wives and children, but the armed forces can readily operate without the presence of families.

Mr. Justice Black in *Reid v. Covert, supra*, at page 23, expressly recognized that "there might be circumstances where a person could be 'in' the armed services for purposes of Clause 14 even though he had not formally been inducted into the military, or did not wear a uniform." He added, "But the wives, children and other dependents of servicemen cannot be placed in that category, * * *" Thus, members of the Supreme Court have recognized a distinction in principle between dependents of servicemen and civilian employees of the armed forces.

In determining whether the words "land and naval forces" as used in Article I, Section 8, Clause 14, of the Constitution, are to be restricted to the uniformed personnel formally mustered into the service, or should also include civilian employees attached to the armed forces, it is necessary to consider the background of the constitutional provision.⁵ It is also essential to bear in mind certain general historic principles of constitutional interpretation and construction. The constitutional history of the United States demonstrates that one of the forces that transformed a weak, loose confederacy of thirteen small colonies nestled against the Atlantic Coast into a large, powerful and prosperous nation, has been the fact that a broad and liberal construction has been placed by the Supreme Court on the enumerated powers of the Congress, thus enabling the building of a strong central government that can withstand the vicissitudes of time. This policy was inaugurated by the historic, epoch-making opinions of Chief Justice Marshall, who was an outstanding statesman, endowed with far-sighted vision, as well as a renowned jurist.

It would seem surplusage to quote his memorable words in *McCulloch v. Maryland*, 4 Wheat. 316, that

⁵ *Gompers v. United States*, 233 U.S. 604, 610.

ring through the ages. They are often repeated and are all too familiar.

A similar but less well known expression is found in an opinion of Justice Story in *Martin v. Hunter*, 1 Wheat. 304, 326-327:

"The constitution unavoidably deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution. It was foreseen, that this would be perilous and difficult, if not an impracticable, task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen, what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications, which, at the present, might seem salutary, might, in the end, prove the overthrow of the system itself. Hence, its powers are expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its powers, as its own wisdom, and the public interests, should require."⁶

The historic background of Clause 14 is significant. It is hardly necessary to advert to the fact that the framers of the Constitution were men of profound learning, but that they were also men of broad practical

⁶ Among the many cases expressing and applying the doctrine of broad construction of congressional powers, the following are typical: *Gibbons v. Ogden*, 9 Wheat. 1, 187-9, 222; *Legal Tender Cases*, 12 Wall. 457, 532; *Juilliard v. Greenman*, 110 U. S. 421, 439; *Matter of Strauss*, 197 U. S. 324, 330-331.

experience, who were in close contact with the problems of their day and who had a thorough knowledge of the needs in the light of which the Constitution was being framed. The British Articles of War of 1765, which were in force at the beginning of the Revolutionary War, placed civilian employees, contractors and suppliers connected with the Army under military discipline. Thus Article XXIII provided:⁷

“All Suttlers and Retainers to a Camp, and all persons whatsoever serving with Our Armies in the Field, though no inlisted Soldiers, are to be subject to orders, according to the Rules and Discipline of War.”

The American Revolutionary Army was governed by similar provisions. Article XXXII of the Articles of War, adopted by the Continental Congress, on June 30, 1775, read as follows:⁸

“All suttlers and retailers to a camp, and all persons whatsoever, serving with the continental army in the field, though not inlisted soldiers, are to be subject to the articles, rules, and regulations of the continental army.”

A like enactment is found in Section XIII, Article 23, of the Articles of War, adopted by the Continental Congress on September 20, 1776:⁹

“All suttlers and retainers to a camp, and all persons whatsoever serving with the armies of the United States in the field, though no inlisted soldier, are to be subject to orders, according to the rules and discipline of war.”

⁷ William Winthrop, *Military Law and Precedents*, 2d Ed., p. 941.

⁸ Journals of the Continental Congress, Volume II, 1775, p. 116.

⁹ Journals of the Continental Congress, Volume V, 1776, p. 800.

It was against this background that the members of the Constitutional Convention of 1787 formulated the provision empowering the Congress to make rules and regulations for the government of the land and naval forces of the United States. It is reasonable to infer that the framers of the Constitution were familiar with previous English and American usage in the matter and, therefore, employed the term "land and naval forces" in a broad sense. Such has also been the continuous construction of this phrase by the Congress from the early days of the Republic. Early congressional interpretation of a constitutional provision at a time when some of the Founding Fathers were still living and active, is particularly significant. Great weight must be attached to such contemporaneous construction.¹⁰ Similarly, continuous construction of a constitutional provision by repeated Acts of Congress and long acquiescence in such an interpretation "entitles the question to be considered at rest".¹¹

The Articles of War enacted by Congress from time to time have invariably applied court-martial jurisdiction to civilian employees and similar persons attached to the armed forces in the field. The first group of Articles of War passed by the Congress were approved on April 10, 1806. Article 60 provided as follows:¹²

"Article 60. All suttlers and retainers to the camp, and all persons whatsoever, serving with

¹⁰ *Cohens v. Virginia*, 6 Wheat. 264, 418; *Cooley v. Board of Wardens of Port of Philadelphia et al.*, 12 How. 299, 315; *Lithographic Co. v. Sarony*, 111 U. S. 53, 57; *McPherson v. Blacker*, 146 U. S. 1, 27; *Knowlton v. Moore*, 178 U. S. 41, 56.

¹¹ *Prigg v. Pennsylvania*, 16 Pet. 539, 621. See also, *The Laura*, 114 U. S. 411, 416; *Springer v. United States*, 102 U. S. 586, 599; *Field v. Clark*, 143 U. S. 649, 691.

¹² 2 Stat. 366.

the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders, according to the rules and discipline of war."

The Articles of War were revised in 1874. Article 63 of that revision reads as follows:¹³

"Art. 63. All retainers to the camp, and all persons serving with the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders, according to the rules and discipline of war."

Another revision of the Articles of War was dated August 29, 1916. Article 2 enumerates the groups of persons subject to military law, and includes the following:¹⁴

"(d) All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles; * * *

Precisely the same provision is found in the Articles of War passed in 1920.¹⁵ The Uniform Code of Military Justice, adopted in 1952, contains a similar provision, which has been heretofore quoted.

Although, as indicated above, the precise question involved in the instant case has never been passed upon by the Supreme Court, other Federal courts that have had occasion to deal with this topic have uniformly held that civilian employees accompanying or

¹³ 2 Rev. Stat. 236 (2d Ed., 1878).

¹⁴ 39 Stat. 651.

¹⁵ 41 Stat. 787, Art. 2 (d).

serving with the armed forces of the United States outside of the territorial jurisdiction of the United States may be subjected to court-martial jurisdiction, *Hines v. Mikell* (C. C. A. 4th) 259 Fed. 28; *Ex parte Falls* (D.-N. J.) 251 Fed. 415; *Ex parte Jochen* (S. D.-Tex.) 257 Fed. 200; *McCuac v. Kilpatrick*, 53 F. Supp. 80; *In re Varney's Petition*, 141 F. Supp. 190. The United States Court of Military Appeals has reached the same conclusion, *United States v. Marker*, 1 USCMA 393; *United States v. Weiman*, 3 USCMA 216; *United States v. Burney*, 6 USCMA 776.¹⁶

The final clause of Article I, Section 8, of the Constitution sometimes denominated by historians as the "elastic clause", empowers the Congress to make all laws which shall be necessary and proper for carrying into execution "the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." That a law subjecting personnel of the type involved in this case to trial by court-martial is necessary and proper for carrying into execution the power to make rules for the government and regulation of the land and naval forces, is demonstrated by a consideration of the consequences of any conclusion that would deny this authority to the Congress. It is manifestly essential to enforce law and order at stations maintained by the armed forces of the United States in foreign countries. "The use of civilian employees is frequently indispensable in connection with the operation of these stations. If court-martial jurisdiction may not be exercised in respect to such civilians, other means of law enforcement would create difficulties

¹⁶ The opinion of Judge Latimer in *United States v. Burney* cited in the text, contains an exhaustive and scholarly discussion of this subject.

that in some instances might prove insuperable. One possible course is to establish Federal civilian courts abroad for the trial of offenses committed by civilian employees of the armed forces. Whether foreign governments would permit the exercise of such extra-territorial jurisdiction is doubtful. It has never been done in modern times except in occupied territory and except in the Orient by special agreements, which have been cast into discard. Moreover, it would not be practicable to obtain juries in foreign countries, for no one could be required to serve on a jury. Similarly, it would not be possible to issue compulsory process against witnesses.

Another possibility would be to bring such offenders back to the United States for trial. Such an arrangement would not be practicable as to serious offenses, for there would be no way of compelling the presence of witnesses. They could be induced to come only on a voluntary basis. As to petty offenses, this course would be too costly and cumbersome. The third possible course is to turn such offenders over to foreign courts for trial.¹⁷

In the light of the foregoing discussion, the court reaches the conclusion that civilian employees attached to the armed forces of the United States abroad may be subjected to trial by court-martial and that hence Article 2, subsection (11) of the Uniform Code of Military Justice is constitutional; that the court-martial by which the petitioner was tried had jurisdiction

¹⁷ See concurring opinion of Mr. Justice Harlan in *Reid v. Covert*, 354 U. S. 1, p. 76, note 12.

Joseph M. Snee, S. J., and Kenneth A. Pye, in their work on "*Status of Forces Agreement; Criminal Jurisdiction*", p. 44, state that the fundamental choice is not between a Federal civilian court and an American court-martial, but between an American court-martial and a foreign court.

over him; and that, consequently, the petitioner is not unlawfully restrained of his liberty.

The order to show cause is discharged and the petition is dismissed.

ALEXANDER HOLTZOFF,
United States District Judge.

JANUARY 13, 1958.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14304

UNITED STATES OF AMERICA, EX REL
DOMINIC GUAGLIARDO, APPELLANT

v.

NEIL H. McELROY, SECRETARY OF DEFENSE,
DEPARTMENT OF DEFENSE, ET AL., APPELLEES

Appeal from the United States District Court for
the District of Columbia

Decided September 12, 1958

Mr. Michael A. Schuchat for appellant.

Mr. John W. Kern, III, Assistant United States Attorney, with whom *Messrs. Oliver Gasch*, United States Attorney, and *Lewis Carroll*, Assistant United States Attorney, were on the brief for appellee.

Before *EDGERTON*, Chief Judge, and *FAHY* and *BURGER*, Circuit Judges.

FAHY, Circuit Judge: Appellant was a civil service employee of the Department of the Air Force of the United States, employed as an electrical lineman at the Nouasseur Air Depot near Casablanca, Morocco. His duties were to maintain and repair airfield lighting and to inspect and repair electrical conduits, transformers, lights, controls, ducts, and manholes.

He lived with his wife off the Depot, in nearby Casablanca. He was entitled to quarters allowance, mail, Commissary and Base Exchange privileges, a United States Air Force ration card, membership in the Air Force Officers Club, and medical and dental care at the Depot.

On July 18, 1957, he and two enlisted men¹ were charged with stealing certain leatherette goods and fabric material at the Depot, in violation of Art. 121, Uniform Code of Military Justice, 10 U. S. C. § 921 (Supp. V, 1958), and with conspiring to commit larceny, in violation of Art. 81, U. C. M. J., 10 U. S. C. § 881 (Supp. V, 1958). They were tried by a general court-martial and found guilty. Appellant was sentenced to pay a fine of \$1,000 and to be confined at hard labor for three years.

In due course the case reached the Board of Review in the Office of the Judge Advocate General, pursuant to Art. 66, U. C. M. J., 10 U. S. C. § 866 (Supp. V, 1958). Appellant then petitioned the United States District Court for the District of Columbia for a writ of habeas corpus. He contended that the military authorities lacked jurisdiction to try him and that accordingly his confinement under the court-martial sentence was unlawful. Relief was denied by the District Court, opinion reported at 158 F. Supp. 171, followed by this appeal.

Appellees contend that the jurisdictional question is prematurely raised because appellant has not exhausted the judicial processes available to him under

¹ One or more civilian Moroccan nationals were also alleged to have been parties to the same transaction. They have been tried in the regular courts of Morocco.

² We ordered appellant admitted to bail pending the appeal.

³ Neil H. McElroy, Secretary of Defense, James H. Douglas, Secretary of the Air Force, and General Thomas D. White, Chief of Staff, United States Air Force.

the Uniform Code of Military Justice. They rely upon *Gusik v. Schilder*, 340 U. S. 128. But that case we think is inapposite, for there court-martial jurisdiction over the accused unquestionably existed since he was a member of the United States Army. He sought to attack collaterally a court-martial judgment because of alleged errors in the court-martial proceedings, without exhausting the administrative remedies available for their correction. Here, in contrast, the question is whether appellant is subject to court-martial jurisdiction at all. Habeas corpus proceedings were used to determine such a question in *Reid v. Covert*, 354 U. S. 1, and *United States ex rel. Toth v. Quarles*, 350 U. S. 11.¹ The point was not discussed, but in view of *Gusik v. Schilder*, *supra*, could not have been overlooked by the Supreme Court, especially as the Court in *Reid v. Covert* specifically noted that the petition was brought "while Mrs. Covert was being held * * * pending a proposed retrial by court-martial * * *." 354 U. S. at 4. If appellees have no court-martial jurisdiction whatever over appellant the Great Writ is available to release him from their custody.

Appellees defend their jurisdiction solely by reason of Art. 2, U. C. M. J., 40 U. S. C. § 802 (Supp. V, 1958). This provision in terms does extend court-martial jurisdiction to appellant for the offense charged. The provision reads:

Moreover, the highest court available under the Uniform Code of Military Justice has consistently upheld jurisdiction over persons in the same legal posture as appellant. Appellant should not be required to await a similar decision in his case. *United States v. Wilson*, No. 9638, U. S. C. M. A., March 28, 1958; *United States v. Rubenstein*, 7 U. S. C. M. A. 523, 22 C. M. R. 313; *United States v. Burney*, 6 U. S. C. M. A. 776, 21 C. M. R. 98; *United States v. Marker*, 1 U. S. C. M. A. 393, 3 C. M. R. 127.

The following persons are subject to this chapter [The Uniform Code of Military Justice]:

* * * * *

(11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States. * * *

Appellant's contention is that this provision is unconstitutional as applied to him, a civilian employee, in time of peace.

The question thus raised must be decided in light of the decision of the Supreme Court in *Reid v. Covert, supra*. The Court there held that in a capital case the wife of a member of the armed forces, who accompanied her husband abroad and there killed him, could not be tried by court-martial—that Art. 2 subparagraph (11), *supra*, was unconstitutional as so applied. The basis for the decision was that the wife was entitled to a jury trial as provided by Art. III, § 2 of the Constitution and to the safeguards of the Fifth and Sixth Amendments.

Article III, § 2 of the Constitution provides that the trial of all crimes excepting cases of impeachment shall be by jury. The pertinent Fifth Amendment provision is that no person shall be held to answer for a capital or otherwise infamous crime unless upon presentment or indictment of a grand jury except in cases arising in the land or naval forces. The pertinent Sixth Amendment provision is that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed. None of these provisions was complied

with in *Reid v. Covert*. And none was complied with in the present case.

Appellees point, however, as was done in *Reid v. Covert*, to Art. I, § 8, cl. 14, of the Constitution, which empowers Congress "to make Rules for the Government and Regulation of the land and naval Forces." It is urged that this provision, together with the Necessary and Proper Clause of the Constitution, Art. I, § 8, cl. 18, has enabled Congress to establish the court-martial jurisdiction specified in subparagraph (11) of Art. 2, U. C. M. J., *supra*, by carving out exceptions to the application of Art. III, § 2 of the Constitution and of the Fifth and Sixth Amendments. Clearly the Constitution does authorize such an exception for members of "the land and naval Forces." But in *Reid v. Covert* the Chief Justice and Mr. Justice Black, Mr. Justice Douglas, and Mr. Justice Brennan, in the opinion written by Mr. Justice Black, would not permit an exception related to the "land and naval Forces" to include civilians unless in rare and unusual circumstances; and Mr. Justice Frankfurter and Mr. Justice Harlan would not permit such an exception to include a civilian wife charged with a capital offense, though accompanying her service husband with the forces outside the United States.

The same considerations, set forth elaborately in the opinions, which thus brought agreement among a majority of the Supreme Court as to the wife in *Reid v. Covert*, would not permit a civilian employee in the situation of appellant to be tried by the United States by court-martial on a capital charge. He would be entitled to a civilian trial by jury. We can think of no constitutional basis for approving the court-martial of such an employee for a capital offense which would not apply equally to Mrs. Covert. Of course the case before us is not a capital one, but if Mrs.

Covert or an employee such as appellant could not be tried by court-martial on a capital charge, notwithstanding the provision of the Military Code purporting to authorize such a trial, the existing congressional plan for extending court-martial jurisdiction to persons accompanying or employed by the armed forces outside the United States exceeds constitutional bounds. Congress did not exclude capital cases. The statute embraces without exception persons "employed by" the forces outside the United States and thus would deprive all civilians in that category of the right to trial by jury for any offense defined in the Military Code, capital or noncapital, and regardless of the nature of the offense or of the relation of the offense or of the employment to the security, discipline, or effectiveness of the forces. The scope of Art. III, § 2 of the Constitution and of the Fifth and Sixth Amendments, as expounded in *Reid v. Covert*, prevents such a curtailment of trial by jury and concomitant extension of court-martial jurisdiction over civilians in time of peace.

This is not to say that legislation bringing some civilian employees within court-martial jurisdiction for some offenses would necessarily be unconstitutional. Cf. *Reid v. Covert*, 354 U. S. at 22-23. It is reasonable to assume that the fullness of the Necessary and Proper Clause, considered with the authority of Congress "to make Rules for the Government and Regulation of the land and naval Forces," and considered also with the present and potential responsibilities of the United States throughout the world, has not been exhausted. But *Reid v. Covert* plainly shows that these sources of legislative power do not sustain the all-inclusive extension of military jurisdiction over civilian employees attempted by subparagraph (11) of Art. 2 of the Military Code.

Since the intended broad sweep of subparagraph (11) is unconstitutional the question arises whether the courts should rewrite the provision along narrower lines and decide the question of its validity as applied to this particular employee for this particular offense. There are numerous instances in which the Supreme Court has held that such judicial reframing of legislation should not be attempted. *Butts v. Merchants & Miners Transp. Co.*, 230 U. S. 126; *Employers' Liability Cases*, 207 U. S. 463, 496-504; *Illinois Cent. R. v. McKendree*, 203 U. S. 515, 528-30; *United States v. Ju Toy*, 198 U. S. 253, 262-63; *James v. Bowman*, 190 U. S. 127, 139-42; *Baldwin v. Franks*, 120 U. S. 678; *United States v. Harris*, 106 U. S. 629, 641-42; *Trade Mark Cases*, 100 U. S. 82, 98-99; *United States v. Reese*, 92 U. S. 214, 221. See, also, *Carter v. Carter Coal Co.*, 298 U. S. 238, 312-17; *Williams v. Standard Oil Co.*, 278 U. S. 235, 242; *Yu Cong Eng v. Trinidad*, 271 U. S. 500, 518-22; *Hill v. Wallace*, 259 U. S. 44, 70.

In *Reese* the Court said:

We are, therefore, directly called upon to decide whether a penal statute enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. * * *

* * * * *

To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty.

We must, therefore, decide that Congress has not as yet provided by "appropriate legislation" for the punishment of the offence charged in the indictment * * *.

In the *Trade Mark Cases*, *supra*, the same principle is stated as follows:

[I]t is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body.

100 U. S. at 98.⁵

In *Yu Cong Eng* the opinion was by Mr. Chief Justice Taft and contains this language:

The effect of the authorities we have quoted is clear to the point that we may not in a criminal statute reduce its generally inclusive terms so as to limit its application to only that class of cases which it was within the power of the legislature to enact, and thus save the statute from invalidity.

271 U. S. at 522.

The case at bar is not one where Congress has laid down a definition of jurisdiction in terms taken from the Constitution, leaving administrative agencies and the courts to apply the definition by a process of inclusion and exclusion according to the facts of particular cases, as was *NLRB v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 30-31.

Appellees urge; however, that since the statute contains a severability clause the doctrine of the *Reese* and kindred cases does not apply. Section 49 (d) of

⁵ While in *Reese* and the *Trade Mark Cases* the Court spoke of crimes defined so broadly as to be beyond constitutional authority, the principle invoked in those cases applies to this attempted extension of court-martial jurisdiction over crimes or persons in such broad terms as to be unconstitutional.

the Act of August 10, 1956, Public Law 1028, 84th Cong.,⁶ provides:

If a part of this Act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this Act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

As the Supreme Court held in *Williams v. Standard Oil Co.*, 278 U. S. 235, 241-42, the general effect of a severability clause is to substitute for the presumption that the legislature intended its act to be effective as an entirety, the opposite presumption of severability; that is, that the legislature intended the act to be divisible. It is said that this presumption must be overcome by considerations which make evident the inseverability of the provisions of the statute, or the clear probability that with the invalid part eliminated the legislature would not have been satisfied with what remains. In *Williams* itself, though the statute was not penal and also contained a severability clause the Court said:

it requires no extended argument to overcome the presumption and to demonstrate the indivisible character of the act under consideration.

278 U. S. at 242.

To the same effect is *Hill v. Wallace*, 259 U. S. 44, 70.

Other cases relied upon by appellées include *Virginia Ry. v. System Federation No. 40*, 300 U. S. 515;

⁶Public Law 1028 enacted into positive law Title 10 of the United States Code, containing, *inter alia*, the Uniform Code of Military Justice. The severability clause, though a part of Public Law 1028, was not enacted into Title 10. It can be found however in the note at page 293 of Supplement V of the 1952 Code (1958).

Wright v. Vinton Branch Bank, 300 U. S. 440; *Crowell v. Benson*, 285 U. S. 22; *St. Louis, S.W. Ry. v. Arkansas*, 235 U. S. 350; *The Abby Dodge*, 223 U. S. 166; *United States v. Delaware and Hudson Co.*, 213 U. S. 366.

We do not think the severability clause authorizes us to divide subparagraph (11) so as to raise the question whether or not persons in appellant's situation might validly be subjected to court-martial jurisdiction. Though *Reid v. Covert* involved a wife and not a civilian employee, we know from that decision that the intended broad coverage of civilians, whether accompanying or employed by the forces abroad, exceeds constitutional bounds. Neither the severability clause nor any other provision affords any standard to guide a constitutional decision in the instant case except the invalid standard of "persons . . . employed by" the armed forces outside the United States. We do not know how to subdivide this provision as Congress might have done if Congress had known it could not be upheld as written. The present severability clause shows only a very general intention to leave in effect all valid applications which are severable from invalid applications, giving no indication of what valid applications Congress thought would be severable. Should we undertake to say that the "persons employed by" clause is divisible so as to apply to appellant we would be called upon to decide whether civilians in general employed by the armed forces outside the United States in time of peace are subject to court-martial jurisdiction. Four members of the Supreme Court in *Reid v. Covert* have said in effect that they are not subject to such jurisdiction; and a majority of the court has not indicated that they are.

The Supreme Court has repeatedly referred to "the wisdom of refraining from avoidable constitutional pronouncements." *United States v. International Auto. Workers*, 352 U. S. 567, 590. This settled principle leads us to decide this case on the ground of nonseverability. Should we hold severable the application of the statute to appellant for the crime here charged, and go on to decide whether his conviction by court-martial was constitutional, obviously we would be deciding an important constitutional question. This course is not required and, therefore, should not be pursued in the circumstances of this case. The relevant precedents call for a decision on the basis spelled out in the *Reese* and kindred cases. Under those decisions we hold that subparagraph (11), which the Supreme Court has held is invalid as presently enacted, *Reid v. Covert*, is nonseverable into fragments which have not been specified by Congress or as to which Congress has not furnished criteria for a case-by-case judicial application. At least the application of the subparagraph to such a civilian as appellant, charged with such an offense as is here involved, cannot be validly carved out of the invalid general spread of that provision.

Our decision leaves Congress free if it so desires to rewrite the legislation with inclusion of criteria for court-martial jurisdiction in terms related more definitely to the security, discipline, and effectiveness of the armed forces abroad. Or Congress might decide in light of *Reid v. Covert* to adopt some other course for the trial by the United States of civilians employed with such forces in time of peace. These legislative matters are not for us to determine; we mention these possibilities because they bear upon the reasons for our decision that the present generality of subparagraph (11) is not to be subdivided by the courts so as to in-

clude appellant when the provision cannot validly include all who were intended to be covered by its terms as the statute left the hands of Congress. There is a complete absence of any legislative standard for the inclusion of appellant other than a standard that includes all civilian employees with the forces abroad, and that standard is so extensive as to be invalid as a basis for denial to civilians tried by the United States in time of peace of the protection of Article III, § 2 of the Constitution and of the Fifth and Sixth Amendments.⁷

Appellant should be discharged from the custody of appellees.⁸

Reversed and remanded.

BURGER, *Circuit Judge*, dissenting: The majority holds invalid a conviction of a civilian employed overseas by the Air Force, under Article 2, Uniform Code of Military Justice, for theft of Government property (valued at over \$4000). They do this even though, as I shall try to demonstrate, there is no other feasible means of law enforcement available at a foreign military base for crimes against the United States. While purporting to make a narrow decision, the consequence of the majority holding is to strike down, for all practical purposes, all of the UCMJ which relates to trial of non-military personnel in peacetime. This holding is reached by two steps (a) the authority of *Reid*

⁷ The principle invoked by appellees that a person may attack as invalid only the attempted invasion of his own rights is not applicable, for the attempted application here is to appellant himself.

⁸ Since submission of the case we have been advised by the United States Attorney that on June 9, 1958, the United States Court of Military Appeals has denied appellant's petition for a grant of review of his court-martial conviction.

v. *Covert*¹ and (b) that this court cannot sever the part of the statute relating to "persons accompanying * * * the armed forces outside the United States" from that part of the statute relating to "persons serving with, [or] employed by * * * the armed forces outside the United States." (10 U. S. C. § 802 (11), Art. 2 UCMJ)

First, *Reid v. Covert* does not warrant the conclusion reached by the majority, and second, the statutory intent as well as the explicit language renders "persons serving with [or] employed by" so readily distinguishable and severable from "persons accompanying" members of the armed forces that no real problem of statutory construction is involved. I therefore see no escape from meeting the constitutional issue and do not think the majority has succeeded in avoiding that issue.

Article I, § 8, cl. 14, of the Constitution empowers Congress "to make Rules for the Government and Regulation of the land and naval Forces." It has been held that this grant empowers Congress to make rules governing this defined class without strict regard for certain constitutional guarantees applicable to citizens generally.² The inquiry here is whether Clause 14, properly interpreted in its constitutional context, empowers Congress to provide for military trials in non-capital cases of United States civilians employed overseas by the armed forces in peacetime. The Supreme Court's holding that Congress did not have the power to provide for such court-martial trials of mili-

¹ 354 U. S. 1 (1957), *rehearing nad reversing*, 351 U. S. 487 (1956), and *Kinselia v. Krueger*, 351 U. S. 470 (1956).

² *Dynes v. Hoover*, 61 U. S. (20 How.) 65 (1857); *Ex parte Reed*, 100 U. S. 13 (1879). Among those constitutional rights which Congress may deny to this defined class are trial by jury and venue requirements (Art. III, § 2, and amend. VI), indictment by grand jury (amend. V).

tary *dependents* charged with *capital* offenses by implication declared unconstitutional one phrase of Article 2 (11) of the Uniform Code of Military Justice, and that phrase only insofar as it relates to capital offenses. *United States v. Dial*, 9 U. S. C. M. A. —, 26 C. M. R. — (Aug. 26, 1958).³ The majority here extends the scope of *Reid v. Covert* in two directions: first, to civilian employees (as distinguished from dependents), and second, to non-capital cases.

Judicial caution, always appropriate in dealing with such far reaching matters as this, is especially in order where, as here, the joint action of the Legislative and Executive Branches under scrutiny deals with the national defense and delicate matters of foreign policy.⁴ The presumptions of constitutionality should not be quickly cast aside merely because a closely connected but legally unrelated portion of the same statute has previously been declared unconstitutional.

Article 2 of the Uniform Code of Military Justice⁵ lists various categories of persons who are subject to military jurisdiction. Subsection (11) so classifies persons serving with, employed by, or accompanying

³ The "persons accompanying" phrase of art. 2 (11), UCMJ, 10 U. S. C. § 802 (11) (Supp. V, 1958).

⁴ "These powers [to raise armies; to build and equip fleets; to prescribe rules for the government of both * * *] ought to exist without limitation, *because it is impossible to foresee or define the extent and variety of national exigencies, or * * * means which may be necessary to satisfy them.* The circumstances which endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed." *THE FEDERALIST* No. 23, at 145 (Ford ed. 1898) (Hamilton) (Emphasis not added.).

⁵ 10 U. S. C. § 802 (Supp. V, 1958).

the armed forces outside the United States * * *.” *Reid v. Covert* invalidates by implication only that part applying to “persons accompanying,” but my colleagues find it impossible to divide subparagraph (11) so as to sustain the distinction between “persons accompanying” on the one hand and “persons serving with [or] employed by” on the other. *Reid v. Covert* itself, the single case on which they rely, furnishes one basis for this distinction.

I

The opinion of Mr. Justice Black, in which he speaks for four members of the Court (himself, the Chief Justice and Justices Douglas and Brennan), is very carefully limited to “wives, children and other dependents of servicemen.” (354 U. S. at 23.) It expressly recognizes “that there might be circumstances where a person could be ‘in’ the armed services for purposes of Clause 14 even though he had not been inducted into the military or did not wear a uniform.” (354 U. S. at 23.)

Justice Black’s opinion declares that military jurisdiction can never be extended to “civilians,” but it scrupulously refrains from drawing a clear line of the boundary between civilians and persons “in” the armed forces. Although it explicitly rejects the argument that the Necessary and Proper Clause could justify extension of military jurisdiction “to any group of persons beyond that class described in Clause 14” (354 U. S. at 20-21), it avoids delineating that class with precision. Indeed, the very language quoted above clearly indicates that the class might well include civilian employees as distinguished from dependents, or at the least, some of them.

Mr. Justice Frankfurter, concurring separately, was unwilling to read Clause 14 in isolation from the

Necessary and Proper Clause. Only by reading the two clauses together, he said, may there "be avoided a strangling literalness in construing a document that is not an enumeration of static rules but the living framework of government designed for an undefined future." (354 U. S. at 43.) Mr. Justice Frankfurter was articulating the same warning we find in the *FEDERALIST* No. 23 dealing with congressional powers "to raise armies." The test he proposed for determining whether the Constitution permits trial of a given civilian for a given crime is whether that person was "so closely related to what Congress may allowably deem essential for the effective 'Government and Regulation of the land and naval Forces' that [he] may be subjected to court-martial jurisdiction." (354 U. S. at 44) for his particular offense. Justice Frankfurter's concurrence was accordingly limited to the position that Congress may not in peacetime provide for military trials of *civilian dependents* charged with *capital* offenses without a grand jury indictment and trial by jury. He makes this "narrow delineation of the issue" (354 U. S. at 45) clear beyond any possible doubt.

Mr. Justice Harlan, in his separate concurrence, also disagreed with Justice Black's dictum that Clause 14 power "was intended to be unmodified by the Necessary and Proper Clause." (354 U. S. at 67.) He emphasizes the position, also taken by Mr. Justice Frankfurter, that special considerations apply in cases involving capital offenses. He warned that the Court should not unnecessarily foreclose its "future consideration of the broad questions involved in maintaining the effectiveness of . . . national [military] outposts" (354 U. S. at 77) by deciding more than was directly involved in the case before it.

The position of the majority of this court is that when the Supreme Court struck down that part of Article 2 (11) relating to capital cases involving "persons accompanying the armed forces," it unavoidably struck down Article 2 (11) in its entirety, and thereby destroyed all authority to try by courts-martial persons "serving with [or] employed by" the armed forces charged with non-capital offenses. Nothing held, or even intimated by the Supreme Court warrants this result, and familiar rules for judicial guidance dictate two courses which would lead to the result I urge: first, this case is readily distinguishable, on its facts, from *Reid v. Covert*; second, we should not hold non-severable a part of the statute which is in no way dependent on or logically related to that part invalidated by the Supreme Court.

The three opinions in *Reid v. Covert* indicate that there are two approaches which may be used to distinguish the present case from the one decided there. First, on the approach of Mr. Justice Black, I suggest that appellant may well be "in" the armed forces for the purposes of Clause 14 jurisdiction and that that Clause, considered in isolation, justifies military jurisdiction in this case. Second, on the approach suggested by the concurring opinions, I conclude that military jurisdiction is warranted here even if it be thought that appellant was not within the specific class delimited by Clause 14. These conclusions are plainly consistent with the holding of *Reid v. Covert*, unless we ignore the distinctions so carefully drawn there by all the opinions.

Even if the conclusion is ultimately reached that "persons serving with [or] employed by" may not be subjected to military jurisdiction, the reasoning and the route must be different. The problem of constitutional interpretation inescapably presented by

this case cannot be side-stepped by citing *Reid v. Covert* as controlling. It will take a new and different step to reach the conclusion that the Constitution prohibits exercise of military jurisdiction in the cases now before us.*

In *Reid v. Covert* the Court considered historical precedent for court-martial jurisdiction over civilians and found that British constitutional history since the Revolution of 1689 and American history strongly compelled the result that was reached.⁶ This same historical approach supplies us with one solid criterion for distinguishing the present case from *Reid v. Covert*. Ever since 1689 military law has been regarded by English speaking people as an unwelcome but necessary abridgment of civil rights. The first British Mutiny Act (1689), after declaring that no man should be punished except by a judgment of his peers, proceeded: "Yet, nevertheless, it being requisite for retaineing such Forces * * * in their Duty an exact discipline be observed."⁷ Despite the pervading desire evidenced here and elsewhere⁸ to place all possible limitations upon the jurisdiction of courts-martial, the British Articles of War in force at the time of our Revolution provided that

"All Suttlers and Retainers to a Camp, and all Persons whatsoever, *serving with Our Armies*

*By order entered October 23, the original language of the dissenting opinion was amended to read as in the text. [Footnote inserted.]

⁶ Justice Black's opinion, 354 U. S. at 23-35.

⁷ As reprinted in WINTHROP, *MILITARY LAW AND PRECEDENTS* 929 (2d ed., Reprint 1920) (hereinafter cited as WINTHROP).

⁸ See the various authorities cited by Mr. Justice Black, 354 U. S. at 24-28; see also the report of Parliamentary debates on the British Mutiny Act (1689) set out in 19 RAPIN, *HISTORY OF ENGLAND* 188-92 (5th ed. Tindal 1763).

in the Field, though no enlisted Soldiers, are to be subject to Orders according to the Rules and Discipline of War." (Emphasis added.)⁹

A substantially identical provision was enacted by the Continental Congress in 1775,¹⁰ was reenacted in 1776,¹¹ and again included in the first Articles of War enacted after the Constitution, in 1806.¹²

Although there is surely reasonable debate over the meaning of the phrase "in the field" as it is used in these articles, there can be no doubt that all of these statutes make allowance for persons "serving with" the armed forces while remaining silent concerning those "accompanying" the army. This is more than a mere verbal distinction. Although there is some slight authority for holding wives of soldiers subject to court-martial under these provisions,¹³ there is definite emphasis on the element of "serving." The fact that two classes of employees—suttlers and retainers—were used surely must be regarded as significant. Whatever disagreement there may be over the precise construction of these articles, it cannot be disputed that, under certain circumstances, military court-martial jurisdiction over civilian employees of the armed forces was standard practice at the time the Constitution was adopted. Provision for such jurisdiction has been maintained in the statutes in some form ever since.¹⁴

⁹ British Articles of War of 1765, art. 23 section 14, reprinted in WINTHROP 941; the same provision is contained in the British Articles of War of 1774, art. 23, section 14, reprinted in DAVIS, *A TREATISE ON THE MILITARY LAW OF THE UNITED STATES* 595 (3d ed. 1915).

¹⁰ 2 J. CONT. CONG. 116 (1775).

¹¹ 5 J. CONT. CONG. 800 (1776), reprinted in WINTHROP 967.

¹² 2 Stat. 366, reprinted in WINTHROP 981.

¹³ See WINTHROP 99 n. 94 and authorities cited there.

¹⁴ Articles of War of 1806, art. 60, 2 Stat. 366, reprinted in WINTHROP 981; Articles of War of 1874, art. 63, REV. STAT.

This power has been repeatedly upheld as constitutional with respect to its exercise during wartime.¹⁵ The central issue here is whether its peacetime exercise is constitutional. Several times it has been held so by various courts under circumstances substantially similar to those in the present case.¹⁶ On the other hand, no case prior to *Reid v. Covert* has been cited or found upholding military jurisdiction over the wife or other dependent of a serviceman, either in peace or war. Indeed, it was not until 1916 that Congress expanded the class subject to courts-martial by adding thereto "persons accompanying" the armed forces.¹⁷ Even then it was not made clear that this phrase included dependents, and the cases arising under it have involved employees, not dependents.¹⁸

§ 1342, p. 236 (1875), reprinted in WINTHROP 991; Articles of War of 1916, art. 2 (d), 39 Stat. 651; UCMJ, art. 2 (11), 10 U. S. C. § 802 (11) (Supp. V, 1958).

¹⁵ *Perlstein v. United States*, 151 F. 2d 187 (3d Cir. 1945), *cert. granted*, 327 U. S. 777, *dismissed as moot*, 328 U. S. 822 (1946); *Hines v. Mikell*, 259 Fed. 28 (4th Cir.), *cert. denied*, 250 U. S. 645 (1919); *Grewe v. France*, 75 F. Supp. 433 (E. D. Wis. 1948); *In re Berue*, 54 F. Supp. 252 (S. D. Ohio 1944); *McCune v. Kilpatrick*, 53 F. Supp. 80 (E. D. Va. 1943); *In re Di Bartolo*, 50 F. Supp. 929 (S. D. N. Y. 1943); *Ex parte Jochen*, 257 Fed. 200 (S. D. Tex. 1919); *Ex parte Falls*, 251 Fed. 415 (D. N. J. 1918); *Ex parte Gerlach*, 247 Fed. 616 (S. D. N. Y. 1917).

¹⁶ *Matter of Varney*, 141 F. Supp. 190 (S. D. Cal. 1956); *United States v. Wilson*, 9 U. S. M. C. A. 60, 25 C. M. R. 322 (1958); *United States v. Burney*, 6 U. S. C. M. A. 776, 21 C. M. R. 98 (1956).

¹⁷ Articles of War of 1916, art. 2 (d), 39 Stat. 651.

¹⁸ *E. g.*, *Perlstein v. United States*, 151 F. 2d 167 (3d Cir. 1945), *cert. granted*, 327 U. S. 777, *dismissed as moot*, 328 U. S. 822 (1946); *In re Di Bartolo*, 50 F. Supp. 929 (S. D. N. Y. 1943). For the legislative history of this addition, see S. Rep. No. 130, 64th Cong., 1st Sess. Pertinent portions are reprinted in *In re Di Bartolo*, *supra* at 932-33.

Without doubt military jurisdiction over essential civilian employees at overseas bases would be sustained in wartime. There remains unanswered whether courts can take judicial notice of the fact that what we call peacetime is, except for degree, much like the sporadic, limited, undeclared warfare with savage Indian tribes and bands a hundred years ago.¹⁹ Under the majority holding a civilian employee of the military on duty in Korea in the 1950-54 period, declared only to be an "emergency," would be immune from punishment for stealing military supplies, except as the "civilian government" of South Korea would try him under its criminal code—if any.

III

The authority for military jurisdiction, with respect both to its wartime and peacetime exercise, rests on Article 1, § 8, cl. 14, read together with the Necessary and Proper Clause.²⁰ Constitutional authority has thus been found for military jurisdiction over civilian employees of the armed forces who are serving outside the United States. Appellant contends, however, that this jurisdiction can be justified only by the existence of a declared state of war.²¹ While such authority must be strictly limited and its exercise scrutinized, it seems to me that circumstances exist other than a state of declared war, which warrant its

¹⁹ *Cf.* U. S. v. Wiese, No. CC 488, National Archives; U. S. v. Trader, No. III 882, National Archives; U. S. v. Barnard, No. III 895, National Archives; U. S. v. Ringsmer, No. III 880, National Archives.

²⁰ See, *e. g.*, Matter of Varney, 141 F. Supp. 190 (S. D. Cal. 1956); *Ex parte Jochen*, 257 Fed. 200 (S. D. Tex. 1919); *United States v. Wilson*, 9 U. S. C. M. A. 60, 25 C. M. R. 322 (1958).

²¹ Brief for Appellant, p. 9.

employment until and unless a workable substitute can be devised.

In the words of THE FEDERALIST, "the circumstances which endanger the safety of nations are infinite and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed."²² The circumstances which today endanger the safety of this and all free nations are utterly different in nature and degree from those which confronted the drafters of the Constitution. The unique perils we face could not be anticipated in the 1780's but the constitutional architects carefully recognized this and left the future reasonably free to deal with its own problems. Among the "unforeseeables" which they prophetically allowed for is the fact that while armies of that day depended chiefly on uniformed soldiers, today in what is technically "peacetime" there are roughly 25,000 civilian employees serving our armed forces at numerous military bases spread throughout the world. That military bases on this scale are maintained by us in peacetime is, in itself, a startling innovation since World War II. Yet the majority holds that Congress may not provide court-martial trial for these essential civilian employees at foreign bases.

This holding at once overlooks the changing world we live in, to which I have already alluded, and forges "constitutional shackles" on the power of Congress and the Executive to deal with present day realities. The "undeclared," "limited" and "cold wars" since 1950 have engaged more men than all the wars in which our country participated from our Revolution to World War I. Moreover cannot be denied that

²² THE FEDERALIST No. 23, at 145 (Ford ed. 1898) (Hamilton).

many of the "persons serving with [or] employed by . . . the armed forces outside the United States" are more essential than the uniformed soldier; that a civilian electronics expert or chemical engineer may be more essential than some generals, where the function of the base is the maintenance of aircraft and readying atomic arms and ICBM's.

The majority opinion attempts to avoid the impact of all these hard and real considerations by relying on *Reid v. Covert*, but these very facts contribute to distinguishing the two cases. These, I am confident, were the considerations which impelled the Supreme Court there to emphasize the narrow scope of its holding. These, no doubt, were the factors that led Mr. Justice Harlan to inveigh against foreclosing "future consideration of the broad questions involved in maintaining the effectiveness of * * * national outposts."²³ Our present holding, if it stands, could have, and probably will have, a major impact on the effectiveness of our "national outposts" at a time when so-called limited warfare may be imminent in various parts of the world; at such a time, above all, none but the most imperative restraints should be imposed by the courts. However expressed, the issue here is simple: it is the delicate problem of balancing important rights of citizens against the needs of maintaining efficient national security. In the narrow context of a capital offense by a wife of a soldier in *Reid v. Covert* the Court found the scales tipped in favor of the individual interest. No challenge to that holding is involved in here resolving the balance in favor of broad national interests. I believe further that the holding I suggest for this case should extend to all non-capital cases involving overseas civilian employees of the armed forces. The question should not

²³ 351 U. S. at 77.

be left open for further litigation on a case-by-case basis with the result that one employee would be amenable to military jurisdiction by virtue of a possibly more intimate connection with the services than appellant while another would not be. To do so would lead to unnecessary administrative as well as judicial chaos.²⁴ I do not reach the question of capital cases of those serving with or employed by the military.

If there were a feasible means, reasonably available for dealing with this problem, Congress should be required to provide procedures for these civilian employees, securing for them indictment by grand jury and trial by jury. But in the absence of a feasible substitute, Clause 14 together with the Necessary and Proper Clause²⁵ seems to me to empower Congress to subject these employees to trial by court-martial. No such substitute is suggested by the majority and I am unable to find any substitute. Several alternatives come to mind as being possible, but none are practical or desirable. The six alternatives are (see footnotes for objections): (a) induct all employees into the service and place them in uniform regardless of training or pay rates; (b) leave trial for crimes committed abroad entirely in the hands of the foreign sovereign in whose territory the act occurred; (c) bring accused employees back to the United States for trial; (d) set up new Article III courts (either within or without the military establishment) to pro-

²⁴ See 71 HARV. L. REV. 140 (1957).

²⁵ In *Reid v. Covert* Mr. Justice Black, disagreeing with the majority of the Court, said we must read Art. I, § 8, cl. 14, in isolation, rather than with the Necessary and Proper Clause. Even conceding this, *arguendo*, the absence of a feasible substitute for overseas court-martial jurisdiction should be an important practical consideration when we undertake judicially to define the limits of the "armed forces." See text at pages 14-15, *supra*.

vide the constitutional procedures for overseas trials of U. S. civilians; (e) provide by employment contracts that these employees subject themselves to court-martial jurisdiction for trial of crimes committed outside the United States; (f) make no attempt to punish these civilian employees for any crimes they might commit overseas, instead merely discharge them.²⁶

²⁶ (a) This would not accomplish the desired result: it would not secure for these persons either trial by jury or indictment by grand jury. Furthermore, it is utterly impractical from the important standpoint of personnel management. Some of the skilled technicians probably command higher wages than generals; yet their jobs require them to work side-by-side with enlisted and non-commissioned personnel.

(b) Like the first suggestion, this also fails to guarantee the sought-for constitutional rights. In some cases it might result in subjecting United States citizens to bizarre or "cruel and inhuman" punishments. In addition, if the employees were stationed in some barren area, not actually under the control of any government (*e. g.*, Antarctica) this alternative would not be available.

(c) This would tend to deprive the accused of the benefit of friendly witnesses. It would violate the fundamental principle that trial should be held where the crime occurred, a principle fought for in the Revolutionary War. In the DECLARATION OF INDEPENDENCE, one of the grievances listed charged the English with "transporting us beyond Seas to be tried for pretended offenses." See also Blume, *The Place of Trial of Criminal Cases*, 43 MICH. L. REV. 59 (1944); Note, *Criminal Jurisdiction over Civilians Accompanying American Armed Forces Overseas*, 71 HARV. L. REV. 712, 717-18 (1958).

(d) This would collide with the sovereign rights of the country where the crime was allegedly committed. Under the present "Status of Force" agreements these countries have granted us the limited privileges of exercising court-martial jurisdiction over our armed forces and persons serving with them. These agreements constitute a substantial concession won only after lengthy negotiation, and it is extremely unlikely that many countries would be willing to permit us to encroach

The problem of finding an alternative to court-martial for the trial of *capital* charges against civilian dependents was considered by the Supreme Court in *Reid v. Covert*.²⁷ That limited situation does not pose as acute a problem for the administration of discipline in the armed forces as does the absence of any practical jurisdiction over *employees* for *all* charges. As Mr. Justice Frankfurter pointed out,²⁸ the incidence of capital charges brought overseas against dependents has been so small since the adoption of the Uniform Code of Military Justice that it does not

further. See *Hearings on Status of the North Atlantic Treaty Organization, Armed Forces, and Military Headquarters Before the Senate Committee on Foreign Relations*, 83d Cong., 1st Sess. (1953); Note, *Criminal Jurisdiction over American Armed Forces Abroad*, 70 HARV. L. REV. 1043 (1957).

(e) There are serious doubts whether such a contract would be valid. Although all of the rights involved here may be waived under certain circumstances, the waiver must be surrounded with certain safeguards. See *Adams v. United States ex rel. McCann*, 317 U. S. 269 (1942); *Patton v. United States*, 281 U. S. 276 (1930). In *Adams v. United States ex rel. McCann*, *supra*, the Court upheld a waiver of trial by jury in the absence of counsel; three justices (Murphy, Black, and Douglas) dissented, and the majority said that "an *accused*, in the exercise of a free and intelligent choice, *and with the considered approval of the court*, may waive trial by jury." 317 U. S. at 275. (Emphasis added.) Here the suggested waiver (by contract) would be made without two of the safeguards the Supreme Court has said are necessary.

(f) Abdication of all legal restraint is unrealistic. It would prejudice the rights and interests of the whole people and of citizens in the overseas community to secure a few rights for a small number; it would tend to break down discipline and would tend to be highly prejudicial to national prestige.

²⁷ See 352 U. S. 901 (1956); Justice Frankfurter concurring, 354 U. S. at 47-49; Supplemental Brief on Rehearing for Appellant, pp. 40-63; Supplemental Brief on Rehearing for Appellee, pp. 137-59.

²⁸ 354 U. S. at 47-48.

merit great consideration. The two-phase extension of *Reid v. Covert* adopted here by the majority at once intensifies and enlarges the problem of a substitute jurisdiction. Yet, as I have pointed out, there is no adequate substitute and my colleagues appear to acknowledge this for they do not even attempt to suggest one.

This case does not in any sense present the courts with military usurpation of civilian power. The military tribunals exercise jurisdiction only to the extent and precisely on the terms fixed by Congress and the Executive—both elected representatives of the people. Together the Legislative and Executive branches can, at will, modify, revoke or exercise broad and effective supervisory powers over the manner in which this jurisdiction is used. I emphasize this because it points up the restraint and caution judges, and more especially this court, ought to exercise in setting aside the carefully considered joint action of the two coordinate branches of government exercising power thought by most reasonable men to have existed for over a century and a half.²⁹ We now strike down such action in reliance on the minority views of the Supreme Court with full awareness that there is no other feasible means of dealing with law enforcement concerning civilians at our foreign bases. *Reid v. Covert* has been called an invitation to murder, but as Mr. Justice Frankfurter suggested, Americans at overseas bases tend to commit relatively few murders.

²⁹ Not controlling, but interesting, is the universal recognition of the UCMJ as the most enlightened military code in history and as affording the basic elements of fairness. This is far from unbridled military power over civilians; it is bridled, harnessed, and hobbled—as it should be—by explicit congressional acts, and subject to the scrutiny of the United States Court of Military Appeals, composed of civilians, and other United States courts via habeas corpus.

The majority opinion here is an invitation to larceny and every other one of the vast array of crimes within the reach of human ingenuity. We are left only with a qualified hope that these offenders may be subject to dismissal from "public service" if the offense can be established. I am unable to join in this kind of judicial negativism which strikes down sound, historically supported legal action and leaves a vacuum which cannot be filled.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Habeas Corpus 123-57

No. 14,304

UNITED STATES OF AMERICA, EX REL DOMINIC
GUAGLIARDO, APPELLANT

v.

NEIL H. McELROY, SECRETARY OF DEFENSE, DEPARTMENT OF DEFENSE, ET AL., APPELLEES

September Term, 1958.

Appeal from the United States District Court for the District of Columbia.

Before: Edgerton, Chief Judge, and Fahy and Burger, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof It is ordered and adjudged by this Court that the order of the District

Court appealed from in this cause be, and it is hereby, reversed, and that this cause be, and it is hereby, remanded to the District Court for further proceedings consistent with the opinion of this Court.

Dated: September 12, 1958.

Per Circuit Judge Fahy.

Separate dissenting opinion by Circuit Judge
Burger.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,630

ALBERT H. GRISHAM, APPELLANT

v.

JOHN C. TAYLOR, WARDEN OF UNITED STATES PENITEN-
TIARY AT LEWISBURG, PENNSYLVANIA

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

Argued October 24, 1958

Before GOODRICH, McLAUGHLIN and KALODNER, *Circuit
Judges.*

OPINION OF THE COURT

(Filed November 20, 1958)

By GOODRICH, *Circuit Judge.*

This is an appeal from a district court decision denying the petitioner habeas corpus, 161 F. Supp. 112 (M. D. Pa. 1958). Albert H. Grisham was a civilian accountant employed by and serving with the United States Army in France. While assigned overseas Grisham and his wife resided in a rented apartment in Orleans. Grisham was arrested by French officials

as a result of the death of his wife in December, 1952. At the request of the Army he was turned over to military authorities and was charged by them with the premeditated murder of his wife, a capital offense. 10 U. S. C. § 918 (Supp. V, 1958). He was tried by a court-martial and convicted of unpremeditated homicide. Having been sentenced to prison, he now seeks release on habeas corpus proceedings.

The foundation of this petition is the Supreme Court's decision in *Reid v. Covert*, 354 U. S. 1 (1957): Our difficulty in this case is to make up our minds how far *Reid v. Covert* takes us. One thing is clear. Under that decision the wife of a man in military service who accompanies her husband abroad cannot in peacetime be tried in a foreign country by a United States military court-martial for a capital crime. But the opinion by Mr. Justice Black was joined by only three of his colleagues. Two others, Mr. Justice Frankfurter and Mr. Justice Harlan, rendered separate concurring opinions and two, Mr. Justice Clark joined by Mr. Justice Burton, dissented.¹

The district court, disposing of the instant case, relied largely on Judge Holtzoff's opinion in *United States ex rel. Guagliardo v. McElroy*, 158 F. Supp. 171 (D. D. C. 1958). But that decision was overruled by the Court of Appeals for the District of Columbia Circuit by a divided court (2-1). — F. 2d — (D. C. Cir. 1958). *Guagliardo* involved the same statute as that in the *Covert* case. It is article 11 of the Uniform Code of Military Justice, 10 U. S. C. § 802 (11) (Supp. V, 1958), which reads as follows:

“(11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law,

¹ Mr. Justice Whittaker took no part in the consideration or decision of the case.

persons serving with, employed by, or accompanying the armed forces outside the United States. * * *

are subject to the authority of the courts-martial described by the statute.

In the *Guagliardo* case the petitioner was a civil service employee of the Air Force. The crime with which he was charged was not a capital crime but larceny. The District of Columbia Circuit Court said that it was not going to decide any constitutional question: that since the Supreme Court had said the section of the Military Justice Code when applied to persons "accompanying the armed forces" was unconstitutional the whole clause fell.

With due deference to a very competent court, we cannot join in this ground for granting a habeas corpus writ. The statute in question expressly contains a reservation clause providing:

"If a part of this Act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this Act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications." Pub. L. No. 1028, 84th Cong., 2d Sess., 70 A. STAT. 640 (Aug. 10, 1956).

We think this provision controls, and that we must look to see whether a difference may not exist as to persons "serving with" or "employed by" from those "accompanying" the armed forces.

Granted that authority compels the conclusion that a wife accompanying her husband abroad is not to be tried by court-martial, it does not follow that persons "serving with" or "employed by" the armed forces may not be so tried. At least it does not so follow until the Supreme Court says that it does. We do not get helpful authority, then, from the

Guagliardo opinion except for a reason we cannot share.

So we are confronted with the problem of the application of the *Covert* case to a civilian employee of the armed forces serving abroad, prosecuted for a capital offense in peacetime and tried by court-martial. Grisham was charged in France with premeditated murder, a capital offense. The conviction was for unpremeditated murder which is not a capital offense.

The question involved is one which we think it is fair to say was left open by the language of Mr. Justice Black's opinion in the *Covert* case. On page 22 of Volume 354, United States Reports, he says:

"Even if it were possible, we need not attempt here to precisely define the boundary between 'civilians' and members of the 'land and naval Forces.' We recognize that there might be circumstances where a person could be 'in' the armed services for purposes of Clause 14 even though he had not formally been inducted into the military or did not wear a uniform."

We do not make this quotation to prove that Mr. Justice Black concluded there was a difference; only to show that the possibility was in his mind and no commitment on the point made.

We think that this civilian Army employee presents a different case from that of a soldier's wife and that the weight of consideration tends to support the argument for permitting Congress to subject him to the jurisdiction of the Courts-Martial as the statute provides.² The fact that civilian personnel accompanying armed forces have, for a long time, apparently been

² The Constitutional source of Congressional authority is Art. I, § 8, cl. 14: "The Congress shall have Power . . . To make Rules for the Government and Regulation of the land and naval Forces."

treated as subject to discipline by military authorities is a factor supporting this conclusion.³ This is not conclusive, of course. But things which have long been established practice run less danger of being called unconstitutional than do innovations. See, for instance, *Ownbey v. Morgan*, 256 U. S. 94, 112 (1921); *Anderson v. Lockett*, 321 U. S. 233, 244 (1944).

There is the practical point. An army can and for years has gone along without wives accompanying it. But civilian employees are essential to the hundreds of things which an army now has to do in addition to fighting. The practical difficulties involved in denying to Courts-Martial jurisdiction over offenses by such people are set out by Mr. Justice Harlan in footnote 12 on page 76 of 354 U. S.⁴

Furthermore, these civilian employees are associating with the Army through their own volition. The soldier may have no choice as to whether he is in the Army or not. Once in, he has no choice about leaving his employment until his term expires. But the civilian can work for the Army or not as he pleases; he can decline to work further if he is told to go where he does not want to go. We think that by voluntarily associating himself with the armed forces it is not unreasonable to put him under the same discipline which members of those forces are under.

Grisham was not living on the Army base at the time of the alleged offense. But he was eligible to receive many privileges which the soldiers got. He

³ The Government cites to us authority going back a long time to show that civilians attached to the armed forces have been subjected to military jurisdiction in time of peace. Unfortunately we do not have access to the material cited, some of which is said to be in the National Archives.

⁴ See Note, *Criminal Jurisdiction Over Civilians Accompanying American Armed Forces Overseas*, 71 Harv. L. Rev. 712 (1958).

could buy goods at the commissary; he could get medical and dental care; he had the benent of the special armed services postal facilities, special customs privileges, etc. We think, therefore, that the fact that he did not live on the Army base is a matter of no significance.

In other words, Grisham was in the position of the person described by Mr. Justice Black and quoted above. He had not been formally inducted, he did not wear a uniform, but he was as closely connected with the Army as though he had.

We are advised by counsel for the respondent that appeal has been taken in one case involving a similar problem⁵ and that certiorari is to be asked for in the District of Columbia case. If the view we have expressed is incorrect there will be opportunity for its correction when the Supreme Court has spoken.

The judgment of the district court will be affirmed.

⁵ *Singleton v. Kinsella*, — F. Supp. — (S. D. W. Va. 1958) (noncapital offense by a dependent wife accompanying her service husband overseas in Germany). Direct appeal to the Supreme Court is available under 28 U. S. C. § 1252 (1952).

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 21

NEIL H. McELROY, SECRETARY OF DEFENSE, ET AL.,
PETITIONERS

v.

THE UNITED STATES OF AMERICA, EX REL. DOMINIC
GUAGLIARDO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals (R. 33-55) is reported at 259 F. 2d 927. The opinion of the District Court (R. 20-32) is reported at 158 F. Supp. 171.

JURISDICTION

The judgment of the Court of Appeals was entered on September 12, 1958 (R. 55-56). The petition for a writ of certiorari was granted on February 24, 1959 (R. 57), 359 U.S. 904. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the light of the decision in *Reid v. Covert*, 354 U.S. 1, Article 2(11) of the Uniform Code

of Military Justice is severable so as to permit the court-martial of an employee of the armed forces serving with the armed forces overseas who commits non-capital offenses in a foreign country.

2. Whether Article 2(11) of the Uniform Code of Military Justice is constitutional as applied to a person employed by the Department of the Air Force and serving overseas who commits a non-capital offense in the foreign country.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The following provisions of the Constitution are involved:

Article I, Section 8. The Congress shall have
Power * * *

Clause 14. To make Rules for the Government and Regulation of the land and naval Forces. * * *

Clause 18. To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

* * * * *

Amendment V. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any

criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The pertinent provisions of the Uniform Code of Military Justice, as codified in 70A Stat. 37, 10 U.S.C. 802, provide:

ARTICLE 2. *Persons subject to this chapter.*
The following persons are subject to this chapter:

* * * * *

(11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States and outside the following: that part of Alaska east of longitude 172 degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands.

* * * * *

3. The Act of August 10, 1956, c. 1041, Section 49(d), 70A Stat. 640, provides:¹

(d) If a part of this Act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this Act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

¹ This severability provision was not codified in Title 10. However, it was part of Public Law 1028, which was enacted into positive law as Title 10. It can be found in 10 U.S.C., p. 958.

STATEMENT

The respondent is a citizen of the United States who in March 1954 was employed by the Department of the Air Force at Nouasseur Air Depot, near Casablanca, Morocco (R. 7). He served with the Air Force as an electrical lineman and his duties consisted of maintaining and repairing air field lighting, inspecting and repairing electrical conduits, transformers, lights, controls, ducts, and manholes (R. 7, 11-12).

Although respondent did not live on the airbase (but in an apartment in Casablanca) he was entitled to a quarters allowance. He was also entitled to such other military benefits as commissary privileges, a United States Air Force ration card, privileges at the base exchange, officer's club membership, use of military payment certificates, and United States mail privileges (R. 12).² Medical and dental treatment at Government expense were available to him (R. 12). His basic pay of \$506.88 per month was paid to him by the Department of the Air Force (R. 13).

On July 18, 1957, respondent and two enlisted men who were also stationed at Nouasseur Air Depot were charged with larceny in violation of Article 121 of the Uniform Code of Military Justice, 10 U.S.C. 921 (Charge I), and conspiracy to commit larceny in violation of Article 81 of the Uniform Code of Military Justice, 10 U.S.C. 881 (Charge II) (R. 13-15). These charges arose out of the theft of leatherette goods and

² Civilians employed by the Air Force within the continental limits of the United States do not have these privileges.

olive drab fabric material having a total value of approximately \$4,690 from the Air Force Base Depot (R. 15).

On August 14, 1957, the charges were referred for trial to a general court-martial (R. 8). Respondent pleaded not guilty to the charges and specifications (R. 8). After a four-day trial, respondent and both of his codefendants were found guilty of all charges and specifications. He was sentenced to a fine of \$1,000 and to confinement at hard labor for three years (R. 8). On review by the convening authority, the finding of guilty on Charge I (larceny) was disapproved because of an error in the instructions, but the sentence as adjudged by the court-martial was approved (R. 8-9).

In December 1957, respondent, while confined in the base stockade at Nouasseur Air Base, Morocco,⁴ filed a petition for a writ of habeas corpus in the District Court for the District of Columbia, alleging that the military authorities had no jurisdiction to try him by

³ Larceny of property of a value of more than fifty dollars in violation of Article 121 carries a maximum penalty of five years, Table of Maximum Punishments, MCM, 1951, p. 223. Conspiracy in violation of Article 81 carries the same maximum penalty as does the particular substantive offenses involved except that the death penalty may not be imposed. *Id.* at 219.

⁴ Subsequent to the filing of the petition in the District Court, respondent was transferred to the U.S. Disciplinary Barracks, New Cumberland, Pennsylvania. He was admitted to bail pending appeal to the Court of Appeals, pursuant to an order of that court, and has been on bail since that time.

court-martial and that his confinement therefore was unlawful (R. 1-3).⁵

The District Court dismissed the petition (R. 32), but the Court of Appeals, one judge dissenting, reversed, and ordered that respondent be discharged from custody (R. 55-56).

SUMMARY OF ARGUMENT

I

In *Reid v. Covert*, 354 U.S. 1, this Court held that Article 2(11) of the Uniform Code of Military Justice is unconstitutional as applied to a dependent charged with committing a capital offense while accompanying a uniformed member of the military to a post in a foreign country. In an effort to decide the instant case on a non-constitutional basis, the majority of the Court of Appeals held that Article 2(11) was non-severable, that therefore the *Covert* decision was binding for all applications of the Article, and that the court-martial of respondent was invalid.

In *Covert*, the Court had before it for determination only the constitutional application of Article

⁵ During the course of the proceedings in the courts below, automatic administrative review of the judgment by a board of review in the Office of the Judge Advocate General of the Air Force was had for the respondent and his co-defendants. As to Guagliardo, the finding of guilty as approved by the convening authority was sustained but the sentence was reduced to two years confinement at hard labor and the portion of the sentence imposing a fine of \$1,000 was eliminated. The sentences of his two co-defendants were similarly approved with a reduction in one case of six months. The petition of respondent to the Court of Military Appeals was denied on June 9, 1958. 26 C.M.R. 516.

2(11) to dependents "accompanying" our armed forces overseas, charged with a capital offense. The various opinions in *Covert* demonstrate that the Court's *decision* was limited to that precise issue. The present case involves the different situation of an employee of the Air Force, serving with the uniformed troops overseas, who was charged with and convicted after trial by court-martial of a non-capital offense. Nevertheless, the Court of Appeals rested its adverse determination on the twin principles that the "employed by" phrase of Article 2(11) was non-severable as between employees charged with capital offenses and those charged non-capitally, and also that this Court had decided in *Covert* that no civilian charged with a capital crime can be court-martialed. Both premises fail to take account of the narrowness of the actual holding of the Court. See, *e.g.*, 354 U.S. at 22-23, 45, 65.

The Court of Appeals likewise does not give proper and legitimate effect to the Congressional intention to include within Article 2(11) several separate and distinct classes of persons. The Uniform Code contains a severability clause which provides (1) that if a part of the Act were held invalid, the remainder should still remain effective and (2) that all valid applications of a part are to be severable from any invalid applications of the same part. The court below disregards the teachings of this Court that, in the face of this type of specific statutory separability provision, the proponent of inseparability has a heavy burden to overcome. In this instance, the statutory presump-

ion is supported and confirmed by (a) the distinction, in fact and in Article 2(11) itself, between civilian dependents and civilian employees, (b) the distinction between capital and non-capital charges, and (c) the development and legislative history of Article 2(11).

The court's reliance on *United States v. Reese*, 92 U.S. 214, is inapposite; in *Reese*, the issue was the application of a broad and general statute to specific narrow situations, whereas in Article 2(11) the statute itself particularizes its application into definite categories. Moreover, the *Reese* principle of inseparability is no longer acceptable or followed.

II.

We support the validity of Article 2(11) of the Uniform Code of Military Justice, as applied to a civilian employee of the armed services charged with non-capital offense overseas, on the ground that Article I, Section 8, Clause 14 of the Constitution (providing for the government and regulation of the land and naval forces), read together with the Necessary and Proper Clause, empowers Congress to include such civilian employees within the court-martial system. In our view, that result is required by (a) the historical development and meaning of Clause 14; (b) the practical necessities for court-martial jurisdiction over such persons; and (c) the unavailability or undesirability of suggested alternatives.

A. 1. There is solid indication in history that prior and contemporaneous with the adoption of the Con-

stitution civilian persons employed by and serving with the armed forces were amenable to trial by court-martial. The test of such jurisdiction, historically, was not whether the person was a soldier wearing a uniform, but rather whether he had a sufficiently close connection with the military.

To guard against the threat of militarism to their liberty, the English evolved a political system of checks and balances, a keystone of which was the principle that the civil power was superior to the military at all times. This system was elaborated through the vehicle of the annual Mutiny Acts whereby Parliament, representing the civil power, determined the size of the army, appropriated the money for its use, and determined who would be amenable to its discipline. Since at least 1688 the British Articles of War—accepted by Parliament—have governed numerous persons other than uniformed soldiers; the armies comprised many functionaries and experts who were not soldiers, but who were connected with the army as a part of its apparatus.

The Articles of War which governed the Continental Army throughout the American Revolution also provided for military jurisdiction over several classes of non-uniformed persons. These Articles made amenable to trial by court-martial such civilian "experts" as commissaries, artillerists, and forage masters, as well as sutlers, wagon drivers, servants to gunners, camp followers, paymasters and others "serving with the army" who may not have been soldiers. Thirteen of the Articles adopted by the

Continental Congress in 1776 provided for the court-martial of persons serving with or connected with the army who were not uniformed soldiers. Winthrop, *Military Law and Precedents*, 2d ed., Reprint 1920, pp. 961-971. Specific provision was also made by the Continental Congress for the trial of persons who were described as being in the "Civil Department" of the Army. Journals of the Continental Congress, Vol. X, p. 72. This authority to court-martial was freely exercised throughout the Revolutionary period.

It was against this background that Clause 14, taken directly from the Articles of Confederation, was adopted by the Constitutional Convention. The framers made a deliberate decision to deal with the problem of militarism by placing the armed services under Congressional control, rather than by limitations on numbers or standing armies or the functions to be performed by the military. Hamilton in *The Federalist* explained that the powers to raise an army and prescribe rules for the land and naval forces "ought to exist without limitation; because it is impossible to foresee or to define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them." It was clearly contemplated that the power to make rules for the government of the land and naval forces would be subject to expansion and development under the Necessary and Proper Clause. Clause 14 was not tied to a confined and rigid compass.

It is therefore not surprising that the pre-Revolutionary pattern was repeated after the adoption of

the Constitution. The 1776 Articles, which were ratified by the first Congress, were applicable in many instances to persons who had some connection with the army but were not uniformed soldiers. In 1806, when the Articles were completely revised by Congress, provision was likewise made for the trial by court-martial of other than uniformed officers or soldiers. Each subsequent reenactment or revision of the Articles of War made provision for the court-martial of persons intimately connected with the army, irrespective of their status as soldiers. While the extension to civilians "accompanying" the armed forces first appeared in 1916, that phrase and its present successor in Article 2(11) of the Uniform Code merely follow this basic historical tradition.

It is true that certain of the early Articles were limited in their application to civilians serving with the army "in the field." However, others were not, and it would be a misconception to assume that the expression "in the field" means "time of war." Historically, the expression has covered those situations where the army is located in circumstances or areas in which the civil power of the home government cannot appropriately operate.

In accordance with this historical development, this Court and other federal courts have held that naval paymasters' clerks, who were clearly neither officers nor soldiers, were a part of the "naval service" for the purpose of court-martial jurisdiction. Likewise, the lower federal courts have consistently determined that for purpose of Clause 14 "it is not necessary that a

person be in uniform in order to be a part of the land forces". *Ex parte Jochen*, 257 Fed. 200, 204 (S.D. Tex.). These cases have covered civilian auditors working with the army, truck drivers, employees of the transport service, mechanics, cooks, etc.

2. Under these historical and judicially-accepted criteria, employees like respondent have a sufficiently close connection with the armed forces overseas to subject them to military jurisdiction. They can properly be considered by Congress to be a part of, and "in", the "land and naval forces" for the purposes of military criminal jurisdiction where our civil judicial power does not extend. Respondent is like the "sutlers", "retainers", "drivers", "wagonmasters", "gunners", "commissaries", "quartermasters", "forage masters", and "paymasters" who have been treated as liable to court-martial—even though not soldiers. His situation at an Air Force Base in Morocco was "in the field"—in the historical sense—especially since at that place "there is no Form of Our Civil Judicature in Force".

B. In addition, court-martial jurisdiction over civilians accompanying or serving with the armed forces overseas is a practical necessity.

1. There are large numbers of American civilians who must be abroad for the defense of the country. As of the present time, there are about 25,000 employees and 455,000 dependents in this category. The employees are, for the most part, essential experts; and the dependents are overseas because it is believed essential to morale for servicemen to have their families with them.

2. These civilians create problems of discipline which can only be solved through the exercise and existence of criminal jurisdiction. A substantial number of offenses are committed by them, and others would surely be committed if it were not for the deterrent of potential punishment. The civilians are truly a part of an integrated group. The whole visiting contingent—soldiers, sailors, airmen, civilian employees, and dependents—is in the eyes of the host state and in terms of the military needs of the United States one unit, for the conduct of which the military commander, who represents the effective power of the United States in the area, is responsible. This is recognized in the NATO Status of Forces Agreement, under which the United States has by treaty assumed the obligation to take necessary measures to assure that its whole contingent conforms to certain standards of conduct. The military authorities must therefore have power of control over the whole unit concomitant with their responsibility for the whole unit.

The Congressional judgment reflected in Article 2(11), that control over the entire visiting contingent is necessary, is supported by the actual experience in the field. As shown in the *Covert* case, Defense Department solicitation of the views of commanders in overseas areas has elicited the response that ability to perform the assigned mission would be seriously impaired if jurisdiction over accompanying civilians is lost. The terms under which accompanying civilians are allowed to enter the host state, the conditions under which they live—sometimes in a virtual enclave—the necessity for providing for their health

and welfare, all serve to interweave their activities with those of the military. The responsibility which overseas commanders must assume under these conditions cannot be divorced from power to supervise and control the whole group.

Certainly, effective control over civilian members of the visiting unit cannot be exercised without criminal jurisdiction. Overseas commanders meet the heavy responsibilities imposed upon them by promulgation of orders, regulations, and other directives applicable to the personnel of their commands, military and civilian. The power to enforce these directives promptly and locally by punishment, when necessary, is essential. It is a basic premise of our law that power to impose fines and imprisonment is the most effective governmental means of deterring infractions. If civilians may disobey directives without being subject to the punishment which could be imposed on the soldier in the same house, or at the next desk, manifest injustice would result.

All kinds of violations by the civilian part of our military contingents overseas—whether they result in assault, the neglect of security regulations, the introduction of narcotics, or black-marketeering—can affect the defense needs of the United States and the acceptability of our military contingents as visitors in a foreign land. The overseas commanders need to have authority available promptly and on the spot, if they are to carry out their duties.

C. To meet this need for appropriate criminal jurisdiction, there are no acceptable alternatives to the exercise of court-martial jurisdiction.

1. Trial in foreign courts is not a satisfactory substitute. A commander responsible for the whole unit should not be expected to rely upon foreign authorities and foreign courts to carry out the responsibilities which the host country has indicated to be that of the United States, and which the United States has assumed. Where injuries are to United States nationals by United States nationals, foreign authorities could not be expected to be as interested in prosecution of our own officials. Moreover, trial in a foreign court would not solve the problem of violations of law and military regulations which are not offenses under the law of the foreign state. In particular, security violations would not be subject to foreign trial. The commander's responsibility for the security of his base requires that law and order be maintained under United States law. Also, to the extent that American offenders would be tried in foreign courts, the mode of trial and of punishment may, in many instances, be regarded as unsatisfactory from an American point of view.

2. Before American citizens could be compulsorily returned to this country for trial here of offenses committed abroad, new agreements would probably have to be negotiated with each country concerned. An attempt to negotiate such new agreements would certainly be difficult for it would undermine the basis upon which our government now asserts jurisdiction—the connection of these persons with our armed forces. If they are not sufficiently connected for the military to have jurisdiction, then they can be said not to be

a part of our visiting military contingent, but in effect mere tourists, not in a status as to which any American court could or should assert control.

Irrespective of international agreement, the difficulties in trying Americans in this country for offenses committed abroad would doubtless preclude domestic trials, except in the most important or pressing cases. In addition to the expense and delay involved, it would be very difficult, if not impossible, to secure the attendance of foreign witnesses. These obstacles can perhaps be overcome in the occasional capital case; they cannot be overcome for the mass of lesser crimes committed by civilians serving with or accompanying the military abroad.

3. A proposal to have United States civilian courts sit in foreign countries and dispense justice according to United States civil law would probably be unacceptable to even the most friendly foreign nation. The long history of the struggle against extra-territorial courts in the Orient and Near East teaches this clearly. And even if the necessary agreement to the importation of American justice into the countries in which we maintain bases and establishments could be secured, such an agreement would not provide grand juries to indict, petit juries to try, competent counsel to defend, and compulsory process to secure the attendance of witnesses.

4. The last alternative is to refrain from sending civilian employees and dependents abroad. But to do so would require that this country be deprived of the services of many highly skilled persons, whose

specialties could often not be duplicated within the armed forces with their more limited financial incentives. It would further entail that our uniformed military personnel be deprived of the company of their families for the length of their tours of duty in foreign countries. The impairment of morale which would inevitably follow would further deplete the pool of manpower available for assignment abroad.

III

Essentially, the real choice is between a trial by an American court-martial and trial and punishment by a foreign court (or no trial at all). While all of the procedural safeguards of a trial by court-martial are not on a parallel with trial in an Article III court, the Uniform Code of Military Justice does represent the best effort of the Congress in the sphere of military jurisdiction to insure that every one in or connected with the military shall receive a fair trial, and, if found guilty, punished in conformity with our system of law. Paragraph by paragraph, and step by step, the Uniform Code of Military Justice and the Manual for Courts-Martial compare not unfavorably in most crucial respects with criminal trials in the states. While it does not offer a jury trial (unavailable also under most foreign systems of law), the Uniform Code of Military Justice—with its elaborate system of appellate review—does assure those who are a part of our military apparatus that they will receive a fair and just trial and, if convicted, will be punished in this country in accordance with our concepts of law and criminology.

ARGUMENT

I

THE "EMPLOYED BY" PHRASE OF ARTICLE 2(11) OF THE UNIFORM CODE OF MILITARY JUSTICE AS APPLIED TO ONE CHARGED WITH COMMITTING A NON-CAPITAL OFFENSE IS SEVERABLE FROM THE "ACCOMPANYING" PHRASE AS APPLIED TO CAPITAL OFFENSES

A. Subparagraph (11) of Article 2 of the Uniform Code of Military Justice (*supra*, p. 3) provides for court-martial jurisdiction of persons "serving with, employed by, or accompanying" the armed services overseas. The Court of Appeals, specifically refusing to place its decision on constitutional grounds, held that these jurisdictional classifications were not severable, and that, in light of the decision of this Court in *Reid v. Covert*, 354 U.S. 1, jurisdiction could not be sustained under the Article with respect to *any* non-uniformed person, whether accused of a capital or a non-capital offense. But in *Reid v. Covert*, 354 U.S. 1, this Court decided only that Article 2(11) cannot constitutionally be applied in time of peace to the trial of civilian *dependents* accompanying members of the Armed Forces of the United States to foreign countries who are charged with *capital* offenses. The Court did not hold that no "civilian" (*i.e.*, a person not an officer or enlisted man in one of the military services) may be tried abroad by courts-martial, nor did it rule that all of Article 2(11) was unconstitutional, or that it could not validly be applied to any non-uniformed person. In the principal opinion, Mr. Justice Black stated, for himself, the Chief Justice,

Mr. Justice Douglas and Mr. Justice Brennan (354 U.S. at 22-23):

We recognize that there might be circumstances where a person could be "in" the armed services for purposes of Clause 14 even though he had not formally been inducted into the military or did not wear a uniform.

And the two concurring Justices were explicit in limiting the issue decided to the question of jurisdiction over dependents accompanying the armed forces overseas who commit capital offenses. Mr. Justice Frankfurter stated (354 U.S. at 45):

In making this adjudication, I must emphasize that it is only the trial of civilian dependents in a capital case in time of peace that is in question. The Court has not before it, and therefore I need not intimate any opinion on, situations involving civilians, in the sense of persons not having a military status, other than dependents. Nor do we have before us a case involving a non-capital crime.

And Mr. Justice Harlan said (354 U.S. at 65):

I concur in the result, on the narrow ground that where the offense is capital, Article 2(11) cannot constitutionally be applied to the trial of civilian dependents of members of the armed forces overseas in times of peace [footnote omitted].

See also 354 U.S. at 75-77.

In relation to *Reid v. Covert*, the present case *prima facie* presents two aspects of severability: (1) severability as between the three basic classes of persons covered by Article 2(11) (i.e., persons serv-

ing with, employed by, or accompanying the armed forces), and (2) severability within each class between those accused of capital offenses and those of non-capital offenses. The court below determined, however, that respondent Guagliardo—an employee charged with a non-capital offense—was not amenable to court-martial for these reasons: (1) the considerations which brought about the decision in *Covert* apply as well to other civilians, such as civilian employees, who are tried on capital charges (R. 37); (2) the “employed by” phrase applies to all employees, without regard to the charge on which they are tried (R. 37); (3) the severability clause of the statute does not authorize the dividing of the “employed by” phrase as between those charged with capital offenses and those charged with non-capital offenses (R. 40–41); (4) accordingly, the entire “employed by” phrase is unconstitutional (R. 38, 40–41); and (5) the statute is invalid as applied to any offense committed by any civilian whether he be accompanying, serving with, or employed by the forces abroad.

As thus posed, the first problem is whether employees (as distinguished from dependents) can be tried by court-martial for capital offenses; the second problem is whether, in any event, within the “employed” class the situation of those who commit non-capital crimes (such as respondent Guagliardo) can be separated from that of those charged with capital offenses. The Court of Appeals treated both questions as if *Covert* compelled a negative answer. It assumed, first, that *Covert* had definitively decided

that no civilian—employee or dependent—charged with capital crimes can be court-martialed. This is, in itself, an erroneous construction of this Court's ruling. As noted above, Mr. Justice Black's opinion expressly refused to rule out the possibility of constitutional military trials for some classes of civilians (354 U.S. at 22-23). More, the two concurring Justices pointedly and painstakingly affirmed that their views were not to be taken as reaching beyond the immediate facts of the case of a *dependent* charged capitally, the only case before them (354 U.S. at 45, 65, 75-77).⁶ Second, *Covert* certainly did not

⁶ The Court of Appeals in *Grisham v. Taylor*, 261 F. 2d 204, at 205 (C.A. 3), No. 58, this Term, recognized that *Covert* had not decided anything as to employees. That court held that the severability clause controlled and placed a duty on the court to determine whether a constitutional difference existed between persons "serving with" or "employed by" from persons "accompanying" the armed forces overseas. The court rejected the *Guagliardo* view that, because a wife "accompanying" her husband overseas cannot be tried by courts-martial for a capital offense, *a fortiori* all persons "serving with" or "employed by" the military could not be so tried. And Judge Burger, dissenting below in the instant case, added an additional reason for not deciding the issue on the ground of severability (R. 44):

"Judicial caution, always appropriate in dealing with such far reaching matters as this, is especially in order where, as here, the joint action of the Legislative and Executive Branches under scrutiny deals with the national defense and delicate matters of foreign policy. The presumptions of constitutionality should not be quickly cast aside merely because a closely connected but legally unrelated portion of the same statute has previously been declared unconstitutional" (footnote omitted).

Two other courts which have had recent occasion to consider this problem have rejected the basic rationale of the majority

pass upon the issue of court-martial trials for non-capital cases, particularly for employees. There would have been little utility in the limitations in the various *Covert* opinions if the problem of non-dependent, non-capital, cases could be solved simply by saying that their category was non-severable from that in *Covert*. Certainly, the very precise limitations in the two concurring opinions could not be justified if the non-severability of Article 2(11) as applied to all persons and situations was plain for all to see. In short, *Covert* did not resolve the issue here.

B. As in other separability cases, the true problem is whether Congress intended that the distinct class of persons "employed by" the armed services should remain subject to court-martial jurisdiction for non-capital offenses, notwithstanding the invalidity of Article 2(11) as applied to another class, i.e., "persons * * * accompanying" the armed forces abroad who commit capital crimes. This question must be answered affirmatively.

The Uniform Code of Military Justice contains a severability clause (Act of August 10, 1956, c. 1041, Sec. 49(d), 70A Stat. 640), which provides:

If a part of this Act is invalid all valid parts that are severable from the invalid part remain in effect. If a part of this Act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable in the invalid applications.

of the Court of Appeals below. See *Wilson v. Bohlender*, 167 F. Supp. 791 (D. Colo.), No. 37, this Term, and *In re Yokoyama*, 170 F. Supp. 467 (S.D. Cal.).

The effect of a separability clause is to establish a presumption of effectiveness for any part of the statute which can be sustained, in lieu of the former general presumption to the contrary. *Williams v. Standard Oil Company*, 278 U.S. 235, 241-242. And this particular severability clause is explicit. First, Congress directed that, if parts of the Act were held invalid, the valid parts were to be severed and remain in effect. Secondly, valid applications of the Act were to be severable from invalid applications. It takes much more than mere conjecture to overcome the presumption of severability arising from such an all-inclusive clause. *Carter v. Carter Coal Co.*, 298 U.S. 238, 312, teaches that:

Under the non-statutory rule [where there is no severability clause], the burden is upon the supporter of the legislation to show the separability of the provisions involved. Under the statutory rule, the burden is shifted to the assailant to show their inseparability.

See also 298 U.S. at 322 (Hughes, C. J., dissenting). This burden cannot be borne by the respondent. *Prima facie*, there would be no reason to believe that Congress would have withheld court-martial jurisdiction over employees committing non-capital offenses if it had known that it could not properly subject dependents to court-martial for capital crimes. The classes are sufficiently different in make-up, function, numbers, and history to preclude their being automatically lumped together. And the legislative history of the Uniform Code—and of the Articles of War on which the Code is principally

based—substantiates the view that Congress would not have intended all of Article 2(11) to fall merely because the “accompanying” portion was invalid as applied to dependents in capital cases. As Congress was well aware, the word “accompanying” was added to the statute only in 1916, whereas the general phrase “serving with” had been in the Articles of War since the time of the Revolution. See the testimony of General Crowder, S. Rep. No. 229, 63d Cong., 2d Sess., p. 48. It cannot be said that, if Congress had known that this Court would hold that the persons coming within the then new jurisdictional classification of “accompanying” could not be tried by courts-martial in capital cases, it would have intended also to eliminate the traditional remainder of the jurisdictional article. So to construe Congress’ intent is to impute a design to jeopardize by a new clause a retained provision which had been operative for many years. Surely Congress had no such destructive purpose.

It is also clear that the early rules of statutory construction announced by this Court in *United States v. Reese*, 92 U.S. 214, which were heavily relied on by the court below, are by their own terms inapplicable in this case. In *Reese*, Congress had drawn a broad penal statute. This Court refused to limit by judicial construction the broad general scope of the law to specific situations which were within constitutional bounds. This case might be analogous to *Reese* if Article 2(11) simply provided in general terms that all civilians abroad were subject to military jurisdiction. But Congress did not choose to announce such

a general grant of power. Instead, it broke down into categories the civilians it intended to reach. Thus, unlike *Reese*, this Court need not by judicial construction limit the language of the jurisdictional statute in order to sustain its constitutionality. The statute itself is so limited.

In any event, the approach employed in *Reese* is not now generally followed by the federal courts. Today, these problems of construction are not viewed as questions of how broadly Congress might have intended the inseparable coverage of the statute; rather, they are seen in the context of the particular fact situation in the particular case before the courts. As was stated in *United States v. Dennis*, 183 F. 2d 201, at 214 (C.A. 2), affirmed, *Dennis v. United States*, 341 U.S. 494:

Even when there is no "separability" clause of any kind, the doctrine of *United States v. Reese*, 92 U.S. 214, 23 L. Ed. 563, does not always apply; the Supreme Court has often limited general words in a statute so as to make it constitutional, although in such cases a court must hazard the inference that Congress would have enacted the statute in the limited form, if it had known that in its broad scope it would be unconstitutional.⁷

A broadly worded statute should be limited, if necessary, to preserve its constitutionality. *The Abby*

⁷ The court went on to say that there was no real hazard in inferring Congressional intent because of the severability clause. There, in the court's view (and in this case as well), the clause made it plain that Congress intended to govern "all cases which they constitutionally could."

Dodge, 223 U.S. 166, 175; *Crowell v. Benson*, 285 U.S. 22, 62; *American Power Company v. S.E.C.*, 329 U.S. 90, 107-108. And a specifically worded act should not be entirely cast out because some of its applications prove to be invalid. *Electric Bond & Share Co. v. Securities and Exchange Commission*, 303 U.S. 419, 433-437; *United States v. Harriss*, 347 U.S. 612, 627; *United Public Workers v. Mitchell*, 330 U.S. 75, 103-104.

In sum, there is no legislative evidence to support any inference that Congress did not intend Article 2(11) to be severable, and under the modern doctrine the statutory separability clause is accordingly decisive. The rule quoted by the Court of Appeals as to the wisdom of refraining from constitutional pronouncements whenever possible is hardly a sufficient ground upon which to obviate what Congress commanded. *United States v. International Auto Workers*, 352 U.S. 567, 589. Congress has enacted that courts-martial shall have jurisdiction over three classes of civilians; and it has said that, if the grant of jurisdiction with respect to any one of these classes or the application of jurisdiction in a particular class exceeded its powers, such jurisdiction as remained valid should remain effective. In disregarding the Congressional intent and well-established rules of separability, the Court of Appeals committed clear error.

ARTICLE 2(11) OF THE UNIFORM CODE IS CONSTITUTIONAL,
AT LEAST AS APPLIED TO A CIVILIAN EMPLOYEE OF THE
ARMED SERVICES CHARGED WITH A NON-CAPITAL OFFENSE
COMMITTED OVERSEAS ⁸

We have shown in Point I that this case cannot be decided on principles of inseparability. The constitutional issue must therefore be faced here as it was in *Covert*. In that case, we supported the application of Article 2(11) of the Uniform Code of Military Justice to overseas service-wives—charged capitally—on two distinct theories: (a) that Congress was empowered by Article I, Section 8, Clause 14 of the Constitution (read with the Necessary and Proper Clause) to include such dependents within the court-martial system; and (b) that, apart from its constitutional power to make rules for the government and regulation of the military forces, Congress could properly base Article 2(11) on its foreign affairs powers. The majority of the Court rejected the second ground as support for Article 2(11), and held that the claimed Congressional power can rest only on the authority in Article I, Section 8, to regulate and control the armed services. So instructed, we confine our argument in the present series of four cases ⁹ to proof that Article I, Section 8, Clause 14 of the Constitution, together with the Necessary and Proper Clause,

⁸ The Government does not concede that a civilian employee charged with a capital offense is not amenable to court-martial under the Constitution. See *Grisham v. Hagan*, No. 58, this Term.

⁹ The other three are: *Kinsella v. Singleton*, No. 22; *Wilson v. Bohlender*, No. 37; and *Grisham v. Hagan*, No. 58.

can and does sustain Article 2(11) as applied here.

Our submission will be that the historical and legal materials, together with the weight of the relevant interests and the practical considerations, tilt the balance squarely to that conclusion. We shall first discuss the historical and legal evidence as to the scope of Clause 14 (Point II, A, *infra*, pp. 28-71); then, the practical necessities for court-martial jurisdiction (Point II, B, *infra*, pp. 71-82); and, finally, the unavailability and undesirability of suggested alternatives (Point II, C, *infra*, pp. 83-101). We believe that each of these factors supports the validity of Article 2(11) under Clause 14, when it is read with the Necessary and Proper Clause. And since the Court in *Covert* did not authoritatively (as a Court) construe Clause 14, we shall necessarily retrace many of our arguments in that case.

A. HISTORY DEMONSTRATES THAT ARTICLE I, SECTION 8, CLAUSE 14 OF THE CONSTITUTION AUTHORIZES CONGRESS TO MAKE EMPLOYEES OF THE ARMED FORCES SERVING OVERSEAS, LIKE RESPONDENT, SUBJECT TO COURT-MARTIAL

1. *Civilians closely connected with the armed services as employees have consistently been subject to military jurisdiction both in England and in this country.*¹⁰

a. *Pre-1789 practice*

The historical materials reflect a solid basis for the view that, prior to and at the time of the adoption of

¹⁰ In addition to presenting some new material, we have attempted to incorporate, or refer to, all the relevant historical materials in our various briefs in the *Covert* case. See Brief for Appellant, pp. 32 ff.; Supplemental Brief for Appellant and

the Constitution, persons employed by and serving with the armed forces were amenable to trial and punishment by court-martial, although they were not soldiers wearing uniforms. The constitutional power "to make Rules for the Government and Regulation of the land and naval Forces" must be understood against this historical background.

(1) *English practice*: In 1689, after the accession of William and Mary and the adoption of the English Bill of Rights, Parliament passed the first Mutiny Act (1 Wm. and Mary, c. 5, Apr. 3, 1689), providing for the trial by court-martial of offenses which theretofore in time of war were punishable by death. See Clode, *Military Forces of the Crown*, Vol. I,¹¹ 142, *et seq.* (1869). The Act expired by its terms six months after its enactment, but thereafter it was renewed periodically. When the first Mutiny Act was passed, the army was governed exclusively under the Articles of War which had been promulgated by the crown. The Act made no reference to these Articles, but it expressly adopted the court-martial tribunals established under them. Clode, *supra*, at 146. Significantly, the Articles of War which then governed the army¹² made provision for the court-mar-

Petitioner on Rehearing pp. 64-82; Reply Brief for Appellant and Petitioner on Rehearing, pp. 23-61; and Supplemental Memorandum for Appellant and Petitioner Following Reargument, pp. 2-7. See also our brief in *Kinsella v. Singleton*, No. 22, this Term, at pp. 15-30.

¹¹ The first Mutiny Act is reprinted in full at Vol. I, p. 499, and in Winthrop, *Military Law and Precedents*, 929.

¹² These Articles are known as the Articles of War of James II. They were adopted by William and Mary when they assumed the throne after the "Glorious Revolution".

tial of commissaries, victuallers and sellers of spirits¹³ who provided the army with supplies, food, and drink. Articles XLIV and XLVI, Winthrop, 926.

During the reign of George I, Parliament for the first time incorporated the Articles of War into the annual Mutiny Act. Act of 4 Geo. I, c. 4 (1718); Clode, *op. cit.*, 146-151; see also Winthrop, 930. Thereafter and through the time of the American Revolution, the Parliament, using the vehicle of the annual Mutiny Acts, supervised the details of the Articles of War and, as a consequence, was the authority which limited the persons and areas to which they were made applicable.

The Articles of War which governed the British Army at the beginning of the American Revolution were those adopted in 1765. Winthrop, 931, *et seq.* By express language these Articles were made applicable to:

All Suttlers and Retainers to a Camp, and all persons whatsoever serving with Our Armies in the Field, though no inlisted Soldiers, are to be subject to orders, according to the Rules and Discipline of War.¹⁴

This Article was designed to cover the numerous persons and classes of persons who attended upon the Army, but who were "no inlisted Soldiers." In the

¹³ That these commissaries, victuallers, etc., were not part of the uniformed force but were civilian "experts" more or less, attached to the army, is shown by Article XLV which provided that "No Officer or Soldier shall be a Victualler in the Army upon pain of being punished at discretion."

¹⁴ Sec. XIV, Art. XXIII, Winthrop, 941.

language of E. Samuel in his *Historical Account of the British Army, and of the Law Military* (London, 1816); at 691-692:

Armies, serving in the field, are at all seasons accompanied by a long train of followers, administering to the support, comfort, and convenience of the troops—some of them public functionaries, such as commissaries, contractors, and their subordinates; and others, of a private condition, as victuallers, shopkeepers, and private dealers, with servants or attendants, attached to the service of the camp, or of individuals retained in it; the number of these different classes of persons bearing a great proportion often to the numbers of those contained in the ranks of armies. These various descriptions of persons live within the boundaries of the camp, have their appointed stations in it, and their persons and their property guarded alike with the soldiery: they are stationary as it is stationary, and move whenever it moves; all their dealings and transactions are with the military state: and their peace and quiet is so intimately connected with that of the military body, that the one cannot be disturbed without the other. Being so blended together in their local situation, in their concerns, and their interests with the soldiery; it would seem almost impracticable to govern them by any other than a law common to them both: and the ordinary law, being wholly incompetent in its provisions and means to the military state and its affairs; which is admitted, in the formation by the legislature of separate and especial regulations for its government;

and there being neither civil courts, nor instruments in the camp for the administration of the ordinary laws; and in foreign countries, the common field of operation to our armies, the laws themselves being wanting, the temporary sojourners, and voluntary members of the camp, are thrown, from absolute need, under the influence of the prevailing law (for it can hardly be insisted that they could be safely left to themselves); whence alone results an uniform and consistent rule, and reciprocal protection.

These same Articles provided that conductors, gunners, matrosses, drivers, or other persons receiving pay or hire in the service of the artillery were to be tried by courts-martial in like manner as officers and soldiers (Sec. XVIII, Art. I). Winthrop, 945. These provisions are important because at the time of the American Revolution artillerymen and the drivers of their wagons were not soldiers or uniformed troops but "civilian" experts. *Encyclopedia Britannica*, Vol. 8, p. 448; *Encyclopedia Americana*, Vol. 2, p. 364;¹⁵ and see *infra*, p. 37 ff. Moreover, ten other articles covered and made amenable to courts-martial other classes of persons serving with or accompanying the

¹⁵ The origin and history of the Royal Artillery is detailed by Clode in his *Military Forces of the Crown* (Vol. I) at pp. 266-268; while the Honorable Artillery Company of London is the oldest corps in Great Britain, in 1782 "they offered their services as a Military body without pay, in such manner as His Majesty should be pleased to command, for the defense of the metropolis and its environs, although they had no rank assigned to them in the Military forces of the Crown." *Id.*, p. 404.

army who were not uniformed troops.¹⁶ Article II of Section XX, after which Article 2(11) of the Uniform Code is directly patterned, provided for the punishment by court-martial of all persons serving certain garrisons overseas "*where there is no Form of Our Civil Judicature in Force.*" Winthrop, 946 (emphasis added).

The applicability of these Articles to civilians as well as to military personnel is carefully detailed by Colonel Winthrop at pages 102-104 of his classic work. While we take issue with his statement that these Articles would only be applicable in time of war (see *infra*, p. 52 ff), there is no gainsaying the evidence which he adduces to establish their broad applicability. They amply demonstrate that provision by the legislature for the trial by court-martial of persons "in civil life" was not repugnant to the English concept of liberty at the time of, and preceding, the American Revolution.

(2) *Colonial and Revolutionary Practice:* (i) The first Articles of War in this country were those

¹⁶ Section IV; Articles V and VI, were applicable to commissaries; Section VIII, Article I, was applicable to sutlers, and Article II of the same section regulated "All Officers, Soldiers, and Suttlers"; Section XIII, Article I, provided for trial by general court-martial of store-keepers and commissaries, as well as of commissioned officers, for embezzlement, misapplication or loss of provisions or ammunitions, etc. Section XIV, Article IX, provided for court-martial jurisdiction with respect to certain offenses over "[a]ny person belonging to Our Forces employed in Foreign Parts * * *". Articles XIV and XV of this section, except only for the conduct proscribed, are practically identical with this Article and so are Articles XVII, XVIII, and XIX of this same section. Winthrop, 933-940.

adopted by the Provisional Congress of Massachusetts Bay on April 5, 1775 (Winthrop, 947). These Articles, which initially governed the "civilian" army of farmers and tradesmen—the Minute Men—who commenced the War of the Revolution, were made applicable to "all Officers, Soldiers, and others concerned," and in Article 31st particularly provided:

All sellers and retailers to a camp, and all persons whatsoever serving with the Massachusetts Army in the field, though not enlisted Soldiers, are to be subject to the Articles, Rules and Regulations of the Massachusetts Army. [*Id.*, p. 950.]

There were five other Articles which contemplated the trial and punishment (including the death penalty) by court-martial of others than uniformed soldiers serving with the army.¹⁷

The American Revolutionary Army was initially governed by Articles of War adopted by the Continental Congress on June 30, 1775. Journals of the Continental Congress, Vol. II, p. 111.¹⁸ Nine of the original sixty-nine Articles provided for the trial by court-martial of those who were part of the army's operation and who were not soldiers or officers.¹⁹ Subsequently, these Articles were revised and new Ar-

¹⁷ Articles 21, 25, 26, 27, 39 and 47. Article 47 was applicable, *inter alia*, to "any other person whatever; receiving pay or hire in the service of the Massachusetts Artillery * * *".

¹⁸ These Articles, with additional Articles enacted November 7, 1775, are reprinted in Winthrop, 953, *et seq.*

¹⁹ Articles XXII, XXVI, XXVII, and XXVIII provided for the trial by court-martial of persons "belonging to the continental army" who had committed the offenses proscribed by the respective Articles; Articles XL and LIV governed the punishment of persons who would interfere with a court-

ticles were adopted by the Continental Congress on September 20, 1776.²⁰ With the exception of certain minor revisions, which are not pertinent, the Revolutionary Army was governed by these Articles for the balance of the war.²¹ Winthrop, 22. Thirteen of the

- martial proceeding, either by menacing or disturbing its proceeding (Article XL), or by refusing to testify when called as witnesses (Article LIV). Article LX provided for the punishment of commissaries who had been convicted of taking "any gift or gratuity on the mustering" of any regiment or troop, etc. The civil character of commissaries is evidenced by the comparison of this Article with Articles LIX and LXI, immediately preceding and following it, which cover the punishment of officers as differentiated from commissaries. Of particular interest are Articles XXXII and XLVIII, which were directly patterned after the British Articles referred to above, and which provided for jurisdiction over "All sutlers and retailers to a camp, and all persons whatsoever, serving with the continental army in the field, though not enlisted soldiers" (Article XXXII) and over "All officers, conductors, gunners, matrosses, drivers, or any other persons whatsoever, receiving pay or hire, in the service of the continental-artillery * * * in like manner with the officers and soldiers of the Continental troops" (Article XLVIII).

²⁰ These Articles are reprinted in Winthrop, 961-971.

²¹ The Articles were prepared principally by John Adams, who described their enactment (John Adams, *Works*, Vol. 3, pp. 83-84):

"In Congress, Jefferson never spoke, and all the labor of the debate on those articles, paragraph by paragraph, was thrown upon me, and such was the opposition, and so undigested were the notions of liberty prevalent among the majority of the members most zealously attached to the public cause, that to this day I scarcely know how it was possible that these articles could have been carried. They were adopted, however, and have governed our armies with little variation to this day [June 7, 1805]."

In preparing these Articles and in working for their adoption, Adams steadfastly maintained that they were based on the cardinal principle that military power must always be subordinate to civil authority (*id.*, p. 87).

1776 Articles made provision for the trial of persons serving or connected with the army who were not officers or soldiers.²²

In 1778, one pertinent addition was made (Journals of the Continental Congress, Vol. X, p. 72):

²² Section IV, Article 6, provided for the punishment of commissaries, members of the civil branch, who were convicted of receiving money or other gratuity on the muster of a regiment; Section VIII, Article 1, governed the conduct of suttlers, and Section XII, Article 1, provided for the general court-martial of store-keepers and commissaries, as well as commissioned officers, for the embezzlement or loss, etc., of provisions, ammunition or other military stores belonging to the United States. Similar to the British Articles of 1765, and the American Articles of 1775, Section XIII, Articles 9, 14, 15, 17, 18, and 19, made provision for the court-martial and punishment of persons "belonging to the forces employed in the service of the United States" (Art. 9), or "belonging to the forces of the United States" (Arts. 14 and 15) or "belonging to the forces of the United States, employed in foreign parts" (Art. 17) and "whosoever" (Arts. 18 and 19). From examination of these particular Articles in their context and a comparison with the other Articles which were made applicable to "soldiers" and "officers," it is readily apparent that they were not limited in their applicability to the uniformed troops. Section XIV, Articles 6 and 14, dealt with the conduct of persons who refused to testify when called as witnesses before a court-martial (Art. 6) and punishment of threats of or disturbances to a court-martial then sitting (Art. 14). Article 23 of Section XIII covered all "suttlers and retainers to a camp, and all persons whatsoever serving with the armies of the United States in the field, though no enlisted soldier," and Article I of Section XVI subjected to military jurisdiction all "officers, conductors, gunners, matrosses, drivers, or any other persons whatsoever, receiving pay or hire in the service of the artillery of the United States." In all substantial respects these two Articles are similar to the Articles covering the same subject adopted by Congress in 1775 (*supra*, p. 34) and to the British Articles of 1765 (*supra*, pp. 30-33).

Resolved, That every person employed either as Commissary, Quarter Master, forage Master, or in any other Civil Department of the Army shall be subject to trial by Court Martial for neglect of duty, or other offense committed in the execution of their office, and upon conviction shall suffer death, or such other punishment as shall be adjudged by sentence of such Court Martial. [Emphasis added.]

This provision recognizes the amenability to trial by court-martial of those persons who by reason of their employment, though not uniformed soldiers, were considered to be a part of the army's "Civil Department". As understood by the Continental Congress, the test of court-martial jurisdiction was *direct connection* with the army, not whether a person was a "soldier" or "civilian".²³

(ii) As already noted, this test of jurisdiction (which was not reluctantly exercised) is illustrated by many examples. Wagon drivers "receiving pay or hire" in the service of the artillery had been made subject to court-martial jurisdiction under the British Articles of 1765 (Sec. XVIII, Art. I, Winthrop, 945, *supra*, p. 32), the American Articles of 1775 (Art. XLVIII, Winthrop, 957, fn. 19, *supra*, pp. 34-35), and the American Articles of 1776 (Sec. XVI, Art.

²³ Another example of the broad view which the Continental Congress had of the reach of the court-martial power is discussed, in some detail, in the Government's Reply Brief in the *Covert* case, pp. 58-60, and its Supplemental Memorandum Following Reargument (in *Covert*), at pp. 2-7. The example concerns acts of the Continental Congress subjecting civilians to trial by court-martial for improper conduct before a court-martial. See also footnote 22, *supra*, p. 36.

I, Winthrop, 970, fn. 22, *supra*, p. 36). During the Revolutionary period, such drivers, and even the artillery gunners, were not enlisted soldiers, but civilian experts. "Horses or oxen, with hired civilian drivers, formed the transport" for the cannon. Manuey, *Artillery Through the Ages* (G.P.O. 1949), p. 10. Their status in Washington's army is shown by the following entry made August 22, 1777, by General George Weedon in *Valley Forge Orderly Book of General George Weedon of the Continental Army under Command of Genl. George Washington, in the Campaign of 1777-8* (pp. 14-15):

As the Congress never have & the Genl. is persuaded never do Intend to give Rank to any of the Waggon Masrs. in this Army, except the Waggon Masr. Genl., They are order'd not to Assume the title of Majors Captains &c. but to be Distinguish'd by the names of Division or Brigade Waggon Masrs. as the case may happen to be, Waggon Masrs. are useful in every Army & will be supported in all their Just Priviledges, but the way for them to obtain respect is by a diligent & faithful discharge of their respective Duties without favour or Affection to anyone.

Louis de Tousard's *American Artillerist's Companion* (1809); Vol. 2, pp. 625-670, contains an excellent index or vocabulary of the various terms then in prevalent usage in the artillery. His definitions indicate the non-uniformed or "civilian" capacity of those classes of persons:

DRIVERS, of baggage or artillery, men who drive the baggage, artillery and stores, and have no

other duty in the army. In the French service this duty is performed by battalions of the train. [P. 635.]

MATROSSES. *Servants*, assistants to the gunners, *cannoniers*. [P. 645.]

WAGONER (*charretier*, fr.) one who drives a wagon. *Corps of WAGONERS*, (*corps de charretiers*, fr.) a body of men employed in the commissariate, so called. This duty is performed at present among the French by battalions of the train. * * * [P. 668.]

The paymasters and commissaries of the Revolutionary Army were likewise persons over whom military jurisdiction was consistently exercised. The commissary had the duty of purchasing stores; he was a civilian appointed by the Congress with the major function of securing the purchase of and payment for the necessary supplies and equipment for the army.²⁴ Article LX of the Articles of War of 1775 provided for the displacement from office and forfeiture of pay of any commissary who was convicted (by court-martial) of taking any gift or gratuity on the mustering of any regiment or on the signing of any muster roll. Winthrop, 958. The Articles of 1776 are replete with instances of the amenability of commissaries and keepers of stores to court-martial jurisdiction. See *e.g.*, Sec. IV, Arts. 5 and 6, and Sec. XII, Art. 1, Winthrop, 962, *et seq.*

²⁴ Following the British system the commissaries received a percentage of all money spent by them on the Army's behalf as their "commission." Cronau, *The Army of the American Revolution and Its Organizer* (1923), p. 28.

The non-uniformed status of these and comparable individuals is concretely illustrated in the report and recommendations, dated January 29, 1778, which Washington made to the Committee of Congress With The Army:

As it does not require military men, to discharge the duties of Commissaries, Forage Masters and Waggon Masters, who are also looked upon as the money making part of the army, no rank should be allowed to any of them, nor indeed to any in the departments merely of a civil nature. Neither is it, in my opinion proper, though it may seem a trivial and inconsequential circumstance, that they should wear the established uniforms of the army, which ought to be considered as a badge of military distinction. [Writings of Washington, Vol. 10, p. 362 at 379.] [Emphasis added.]

Nevertheless, the subjection of commissaries to military jurisdiction and punishment is made clear by the instructions issued by General Washington on October 18, 1778:

* * * The mode of treating the Commissaries and their Assistants in case of neglect of duty or misdemeanour is pointed out in the resolve of Congress made for the regulation of the Department, which directs that they be tried by a Court Martial by order of the Commander in chief, or Genl Officer commanding a post. [*Writings of Washington*, Vol. 13, p. 103.]²⁵

²⁵ Instances of the exercise of military jurisdiction over persons in these positions are detailed in *Washington's Writings*: On January 22, 1778, Thomas Scot, a wagon master, was

b. *The Constitutional Convention*

The principal debates in the Constitutional Convention were not concerned with authority to govern the military forces. The language of Article I, Section 8, Clause 14, is taken directly from the Articles of Confederation. Prescott, *Drafting the Federal Constitu-*

tion, tried by court-martial and acquitted. Vol. 10, p. 359. On May 25, 1778, William Whiteman, described as a "waggoner", was sentenced. Vol. 11, p. 487. And on September 2, 1780, Joseph Smallwood, another "waggoner", was convicted after trial by court-martial and sentenced. At the same time, an express rider was convicted and the court martial sentenced him to a flogging and dismissal from the service. Vol. 20, pp. 24-25.

On July 17, 1778, a Mr. James Davidson, described as Quarter Master of Col. James Livingston's regiment, was tried by court-martial and convicted of defrauding the soldiers and embezzling Continental property. Vol. 12, p. 242. On October 1, 1779, a Benjamin Ballard, an assistant "Commissary of Issues" was tried by court-martial for selling food and provisions, etc., without orders or authority to do so and another assistant "Commissary of Hides" was tried for giving a pass to a soldier without authority. Vol. 16, pp. 385-386. On September 27, 1780, one Abraham Cooper, waggoner, was tried by court-martial for embezzling public stores and acquitted. Vol. 20, p. 96. On December 16, 1780, a Benjamin Stevens, a commissary, was tried by general court-martial at West Point. Vol. 21, p. 19, and on December 16, 1780, one Thomas Dewee, a barrack master, was tried by general court-martial on five charges. Vol. 21, pp. 22-23. On February 5, 1781, an instance is recorded of the ordering of a general court-martial to be convened to try one John Collins, an assistant deputy commissary. Vol. 21, p. 190.

On February 24, 1778, a forage master was convicted after trial by court-martial of violating Art. 5, Sec. 18 of the Articles of War and ordered dismissed from the Army. Vol. 10, p. 507. On October 10, 1778, the execution of a sentence imposed on a civilian for counterfeiting was approved. Vol. 13, p. 54, and on November 23, 1778, approval was given to the conviction

tion (1941), p. 526; 5 Elliott's Debates 443.²⁶ The meaning of the clause in those Articles is plainly reflected in the historical materials we have just canvassed (*supra*, pp. 28-41).

The controversy in the Constitutional Convention centered on whether there would be a standing army or whether the militia of the various states would be the source of military power. Prescott, *supra*, pp. 515-525; 5 Elliott's Debates 443-445. On the one hand, there was the fear of a standing army as being detrimental to liberty; on the other was the necessity of such an army for the preservation of peace and defense of

and sentence by court-martial of an express rider, who was tried and convicted of stealing. Vol. 13, p. 314.

Reference to the *Orderly Book* of Gen. George Weedon, *supra*, p. 38, also shows that during the campaign of 1777-78 in Washington's Camp at Valley Forge the trial by court-martial of classes of persons who were not soldiers or officers was not uncommon. On August 20, 1777, Jacob Moon, "Pay-Mstr. to 14th V. Regt.", was convicted after trial by court-martial. *Id.*, pp. 9-10. On January 3, 1778, John McClure pleaded guilty before a court-martial to a charge of suttling in camps contrary to general orders. *Id.*, p. 177. On January 5, 1778, Dunham Ford, a commissary, was found guilty after trial by court-martial of theft and was sentenced to pay a fine of \$200.00 and to be mounted backwards on a horse, without saddle, his coat turned wrong side out, hands tied behind him, and drummed out of camp. *Id.*, p. 180. And on March 10, 1778, a civilian adjutant of the "13th Virga. Reg." was tried by court-martial "with his own Consent." *Id.*, pp. 252-3. Lt. John Marshall, later Chief Justice of the United States, served as Deputy Judge Advocate in the prosecution of these cases, having been appointed November 20, 1777. *Id.*, p. 134.

²⁶ The clause was included in the final draft of the Constitution without discussion or debate. Neither the original draft presented to the Convention nor the draft submitted by the Committee of Detail contained the clause. 5 Elliott's Debates 130, 379.

the country. Coupled with this was the maintenance of the militia as a protection against the usurpation of power by the national government. Glenn and Schiller, *The Army and the Law*, pp. 14, 18-20. These views were reconciled by taking over the concept embodied in the British Mutiny Acts (*supra*, pp. 29-33)—that is, that the Congress, epitomizing the civil authority, rather than the commander-in-chief or the military officers, would control the size and functions of the standing army. This was accomplished by a provision that no appropriation for the support of the army could be made for a longer period than two years (Article I, Sec. 8, Cl. 12), and by the continuance of the militia "according to the discipline prescribed by Congress" (Article I, Sec. 8, Cls. 15 and 16, and Amendment II). As summed up by James Madison in *The Federalist*, No. 41:

Next to the effectual establishment of the union, the best possible precaution against danger from standing armies, is a limitation of the term for which revenue may be appropriated to their support. This precaution the constitution has prudently added. * * *

Thus, it was the basic decision of the Constitutional Convention that effective protection against the sort of military abuses which had been suffered in the past at the hands of the British crown was to be accomplished by making the military subject to the control of the popularly elected legislature, rather than by specific constitutional limitations. All constitutional restrictions on the size of the army were voted down; the simple solution was to give the power to raise and support

armies not to the Executive but to Congress. See Hamilton, *The Federalist*, No. 24. The power to make rules for the government and regulations of the military and its components was also given to the Congress. The framers evidently believed that, by following the British system of placing the power to raise and determine the size of the army in the legislature, and by limiting appropriations to two years, they had succeeded in obviating the danger of military supremacy to the destruction of the liberties of the people.²⁷

In *The Federalist*, No. 23, Hamilton discussed the military powers which would be given to the federal government by the Constitution then under consideration by the states. In explaining the power given Congress to make rules for the government of the army and the navy, he stated that this power properly was left without limitation so that Congress could use a great variety of means to meet changing circumstances:

The authorities essential to the care of the common defence, are these: to raise armies; to build and equip fleets; to *prescribe rules for the government of both*; to direct their operations; to

²⁷ Though these concepts and provisions were vigorously debated during the period prior to the Constitution's ratification (Beveridge, *The Life of John Marshall*, Vol. 1, pp. 391, *et seq.*), there apparently was no debate or criticism of the authority given to Congress by Clause 14. In the light of the recent Revolutionary War and the fact that so many had been a part of the army, it must be concluded that there was knowledge that other than uniformed soldiers were included in this authority granted to Congress. This is implicit in Alexander Hamilton's recognition of "standing armies, and the correspondent appendages of military establishment". *The Federalist*, No. 8.

provide for their support. *These powers ought to exist without limitation; because it is impossible to foresee or define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them.* The circumstances that endanger the safety of nations are infinite; and for this reason, no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be coextensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils which are appointed to preside over the common defence.

* * * * *

* * * Shall the union be constituted the guardian of the common safety? Are fleets and armies, and revenues, necessary for this purpose? The government of the union must be empowered to pass all laws, *and to make all regulations which have relation to them.* * * *

* * * * *

Every view we may take of the subject, as candid inquirers after truth, will serve to convince us, that it is both unwise and dangerous to deny the federal government an unconfined authority in respect to all those objects which are entrusted to its management. * * * A government, the constitution of which renders it unfit to be entrusted with all the powers which a free people ought to delegate to any government, would be an unsafe and improper depository of the national interests. Wherever these can with propriety be confided, the coincident

powers may safely accompany them. [Emphasis added.]

This is a clear and authoritative statement that the power to make rules for the government of the armed forces was intended to give Congress the authority to use means the "extent and variety" of which it was "impossible to foresee or to define".²⁸ Congress was to have the power "to make all regulations which have relation to" the fleets or the armies. Thus, the authority conferred by Article I, Section 8, Clause 14, like the other enumerated powers, was plainly to be read in conjunction with the Necessary and Proper Clause as a grant susceptible of expansion and adaptation as circumstances changed. Clause 14 was not thought to be tied to a confined and rigid compass. The controlling doctrine of *McCulloch v. Maryland*, 4 Wheat. 316, 407, 411-412, 421, 423, was to be fully applicable. See the opinions of Justices Frankfurter and Harlan in *Covert*, 354 U.S. 1, 43-44, 67-69, and the Supplemental Brief for Appellant and Petitioner on Rehearing in *Covert*, at pp. 69-76.²⁹

²⁸ Hamilton was a distinguished army officer (aide-de-camp to Washington) who undoubtedly knew that civilians in certain circumstances were subject to court-martial jurisdiction.

²⁹ Nothing in the history of the Fifth and Sixth Amendments detracts from this conclusion. The journals of the state and federal conventions fail to disclose anything tending to show a relationship between the Sixth Amendment and Article I, Section 8, Clause 14. In the majority of the state conventions, the debates centered on the failure of the Constitution to provide for trial by jury in civil cases. 2 Elliot's Debates 515; 4 Elliot's Debates 143, 151; *The Federalist*, No. 83. The ex-

Moreover, the constitutional term "land and naval Forces" was not synonymous with "armed forces" or "armed services". See Cong. Globe, 37th Cong., 3d Sess., 995, *et seq.* The early forces of England included the mariners of the merchant vessels in which the servicemen were transported (45 U.S. Naval Institute Proceedings 355, 367); the ancient Court of Chivalry heard the cases of nonmilitary persons connected with the armies (9 U.S. Naval Institute Proceedings 692, 694-696); noncombatants accredited by military authority have been treated when captured as part of the land forces (Geneva Convention Relative to Treatment of Prisoners of War (1949), Art. 4A (4)).³⁰

c. Development of the Articles of War Subsequent to the Adoption of the Constitution

Immediately after the formation of the Government under the Constitution, Congress adopted the existing Articles of War, which were essentially the Articles of 1776. Act of September 29, 1789, c. 25, Sec. 4, 1 Stat. 96. By this Act, Congress approved those provisions set forth above (*supra*, pp. 34-36) which conferred military jurisdiction over persons consid-

ception, incorporated in the Fifth Amendment, for "cases arising in the land and naval forces" was apparently not a subject of controversy. This Court has said that the power given to Congress to provide for trial and punishment of military offenses under Article I, Section 8, and the judicial power of the United States "are entirely independent of each other". *Dynes v. Hoover*, 20 How. 65, 79.

³⁰ See also *Johnson v. Sayre*, 158 U.S. 109, discussed, *infra*, pp. 61-62; and the materials collated, *supra*, pp. 29-42.

ered to be an integral part of the military forces, although neither officer nor soldier. Thereafter, by the Act of April 30, 1790, c. 10, Sec. 13, 1 Stat. 121, the Articles of War were specifically made applicable to "commissioned officers, non-commissioned officers, privates and *musicians*". (Emphasis added.)

In subsequent Articles, provision has invariably been made for the exercise of court-martial jurisdiction over "retainers" and other personnel serving with the army in the field who are not soldiers. In the first complete enactment of the Articles subsequent to the adoption of the Constitution—that of April 10, 1806—Article 60 (2 Stat. 366) in effect reenacted the provisions for jurisdiction over sutlers, retainers, and "all persons whatsoever, serving with the armies of the United States in the field, though not enlisted soldiers". These Articles of 1806 were considered at length before their adoption. 15 Annals of Cong., 9th Cong., 1st Sess., pp. 264, 326–327, 338. In addition to Article 60, they contained eight other provisions providing for the trial by court-martial of other than uniformed officers or soldiers. Winthrop, 976, *et seq.*³¹

³¹ Article 29 made provision for the regulation of sutlers; Article 36 provided for a general court-martial of store-keepers and commissaries as well as of commissioned officers who should be convicted of having embezzled, misapplied, etc., property, arms, of stores belonging to the United States; Article 53 provided for the death penalty upon the sentence of a general court-martial of "[a]ny person belonging to the armies of the United States" who should be convicted of making the watch word known to any other person; Article 55 provided that "[w]hosoever, belonging to the armies of the United States, employed in foreign parts, shall force a safeguard, shall suffer death"; Articles 56 and 57 provided for the court-martial of all

Of particular note is Article 87, which demonstrates the intention of Congress that these Articles of War would be applicable to, and trial by court-martial would be appropriate for, others than uniformed soldiers. This Article provided:

No person shall be sentenced to suffer death, but by the concurrence of two-thirds of the members of a general court-martial, nor except in the cases herein expressly mentioned; nor shall more than fifty lashes be inflicted on any offender, at the discretion of a court-martial; and no officer, non-commissioned officer, soldier, or *follower of the army*, shall be tried a second time for the same offence. [Emphasis added.]

Provisions similar to Article 60 of the Articles of 1806, dealing with court-martial jurisdiction over retainers and other personnel serving with the army in the field, have been made in all subsequent reenactments of the military code: In the revision of 1874, Rev. Stat. (2d ed. 1878), p. 236 (Article 63); in 1916, 39 Stat. 651; in 1920, 41 Stat. 787; and in the adoption of the Uniform Code of Military Justice, 64 Stat. 109, codified in 70A Stat. 37, 10 U.S.C. 802(11).

In 1916, during a general revision of the Articles of War, Congress used phraseology which is substantially equivalent to that of present Article 2(11).

persons—denominated “[w]hosoever”—to indicate the inclusion of more than officers or enlisted soldiers; and Article 96 provided that the Articles applied to all “officers, conductors, gunners, matrosses, drivers, or other persons whatsoever, receiving pay, or hire, in the service of the artillery, or corps of engineers of the United States.”

No new constitutional concept was thought to be adopted; the military jurisdiction which had previously been recognized was clarified by the reenactment. In the language of General Enoch H. Crowder, then Judge Advocate General of the Army, Hearings before the House Committee on Military Affairs, 62d Cong., 2d Sess., on H.R. 23628, p. 61:

There is nothing new in the article in subjecting these several classes to the provisions of article 65. It is a jurisdiction which has always been exercised. When any person joins an army in the field and subjects himself by that act to the discipline of the camp he acquires the capacity to imperil the safety of the command to the same degree as a man under the obligation of an enlistment contract or of a commission.³²

³² General Crowder also said (see S. Rep. No. 130, 64th Cong., 1st Sess., pp. 37-38):

"In the present condition of our Articles of War 'retainers to the camp' (i.e., officers' servants, newspaper correspondents, telegraph operators, etc.) and 'persons serving with the armies in the field' (i.e., civilian clerks, teamsters, laborers, interpreters, guides, contract surgeons, officials, and employees of the provost marshal general's department, officers and men employed on transports, etc.) are made subject to the Articles of War only during the period and pendency of war and while in the theater of military operations. A number of persons who manage to accompany the Army, not in the capacity of retainers or of persons serving therewith, are not included. They constitute a class whose subjection to the Articles of War is quite as necessary as in the case of the two classes expressly mentioned. Accordingly the article has been expanded to include also persons accompanying the Army. The existing articles are further defective in that they do not permit the disciplining of these three classes of camp followers in time of peace in places to which the civil jurisdiction of the United

Congress adopted the changes suggested by General Crowder by enacting Article 2(d) of the Articles of War of 1916, which provided:

(d) All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles.³³

After full consideration by an eminent committee of experts and by Congress, Article 2(11) of the present Uniform Code—reflecting the fact that, while there is no war, there is a world situation far short of perfect “peace,” requiring large military commitments across the world—re-promulgated the provision that civilians “accompanying or serving with” the armed forces overseas are subject to court-martial jurisdiction, and it further redefined the concept by adding the “employed by” classification.

States does not extend and where it is contrary to international policy to subject such persons to the local jurisdiction, or where, for other reasons, the law of the local jurisdiction is not applicable, thus leaving these classes practically without liability to punishment for their unlawful acts under such circumstances—as, for example, where our forces accompanied by such camp followers are permitted peaceful transit through Canadian, Mexican, or other foreign territory, or where such forces so accompanied are engaged in the nonhostile occupation of foreign territory, as was the case during the intervention of 1906–7 in Cuba.”

³³ The 1916 provision was reenacted in 1920, 41 Stat. 787.

d. *The Concept of "In the Field"*

Some of the various Articles of War limited jurisdiction over certain "connected" civilians to persons with the armies "in the field."³⁴ On the other hand, a number of other Articles dealing with court-martial jurisdiction over civilian employees serving with the armed forces do not use that phrase.³⁵ Beyond that, however, we submit that it would be a misconception to view the phrase "in the field," as it was used in the old Articles of War, as connoting "time of war" or as being limited to hostilities or a zone of actual operations. As Mr. Justice Harlan pointed out in his concurring opinion in *Covert* (354 U.S. at 71, note 8): "The essential element was thought to be, not so much

³⁴ E.g., "All Suttlers and Retainers to a Camp, and all persons whatsoever serving with Our Armies in the Field * * *" (British Articles of War of 1765, Sec. 14, Art. 23, Winthrop, 941).

"All suttlers and retailers to a camp, and all persons whatsoever, serving with the continental army in the field * * *" (American Articles of War of 1775, Art. 32, 2 J. Cont. Cong. 111).

"All sutlers and retainers to the camp, and all persons whatsoever, serving with the armies of the United States in the field * * *" (American Articles of War of 1806, Art. 60) Act of April 10, 1806, 2 Stat. 359.

"All retainers to the camp, and all persons serving with the armies of the United States in the field * * *" (American Articles of War of 1874, Art. 63, R.S. § 1342).

³⁵ Eleven Articles of the British Articles of War of 1765, p. 32, *supra*; five Articles of the Articles of War of Massachusetts Bay of 1775, p. 34, *supra*; ~~nine~~ ^{eight} of the original 69 Articles of the American Articles of War of 1775, p. 34, *supra*; ~~thirteen~~ ^{fourteen} Articles of the American Articles of 1776, pp. 35-36, *supra*; and ~~nine~~ ^{eight} Articles of the Articles of War enacted by the Congress in 1806, p. 48, *supra*.

that there be war, in the technical sense, but rather that the forces and their retainers be 'in the field.' The latter concept, in turn, would seem to have extended to any area where the nature of the military position and the absence of civil authority made military control over the whole camp appropriate." Historically, "in the field" has included a force located where the civil power of the home government could not operate.

(i) As already noted, the basic concept of the present Article 2(11) of the Uniform Code of Military Justice is taken from Section XX, Art. II, of the British Articles of 1765. See *supra*, p. 33. This Article provided for trial by court-martial of crimes otherwise cognizable in the civil courts at Gibraltar, Minorca, Placentia and Annapolis Royal "where Our Forces now are, or in any other Place beyond the Seas, to which any of Our Troops are or may be hereafter commanded, and where there is no Form of Our Civil Judicature in Force." Winthrop, 946. (Emphasis added.) The application of this Article was not limited to soldiers or officers or to time of war; it applied to all "persons" under the command of the Commanding Officer, in time of peace as well as war. This is borne out and explained by such writers as Samuel in his *Historical Account of the British Army, and of the Law Military* (published in London in 1816), explaining the necessity for the exercise of such jurisdiction. See *supra*, pp. 31-32.

(ii) The American experience during the seventy-five years following the adoption of the Constitution

confirms the view that sutlers and retainers were subject to military jurisdiction in the field in time of peace.

For instance, that court-martial jurisdiction might apply to civilians once they left the United States—i.e., were “in the field”—was explicitly understood by the Congress in 1800. In the Rules and Regulations for the Government of the Navy adopted on April 23, 1800, the Congress included Article XXI:

The crime of murder, when committed by any officer, seaman, or marine, belonging to any public ship or vessel of the United States, without the territorial jurisdiction of the same, may be punished with death by the sentence of a court martial [2 Stat. 48].

This Article applied to civilian seamen,³⁶ who by virtue of the statute were left subject to civilian juris-

³⁶ This is abundantly clear from the test which distinguishes between seamen “belonging to any public ship or vessel of the United States” on one hand, and a “person in the navy” or “persons belonging to the navy” on the other. See, e.g., Articles XIII, XVI, XVII, XVIII, XXXII. Contemporary statutes referred to civilian personnel as “seamen” whether on merchant vessels (1 Stat. 729) or on other public vessels of the United States, such as revenue cutters (3 Stat. 127). The 1862 Article on the same point made it explicit that it applied to any “person belonging to any public ship or vessel of the United States” (12 Stat. 602). See Kensil Bell, *“Always Ready!”—The Story of the United States Coast Guard* (1943), for examples of public vessels manned by civilian seamen in 1800.

Since 1800, murders committed outside the United States by persons connected with that branch of the armed services which was most frequently outside the United States—the Navy—have been subject to trial by court-martial.

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diction while within the territory of the United States, but when outside that territory—where United States civil courts would not be effective in punishing and deterring crime—were subject to a military trial.

The controlling concept of remoteness and absence of civil authority continued to be reflected in the materials. In 1814, the Attorney General, in expressing the opinion that punishment by court-martial of offenses committed on board vessels commissioned under letters-of-marque was contemplated only when such offenses happened out of the jurisdiction of the United States, said (1 Op. Atty. Gen. 177):

The reason for the distinction may probably have been, that, unless the authority of the court-martial had been recognised for offences committed on board of these vessels when abroad, no punishment could have followed them—it being matter of great doubt how far the common code of the United States extends to the high seas; but for all such offences as may take place on board of them while they are within the jurisdictional limits of the United States, or their territories, the ordinary courts of law of the country are competent to afford redress. The jurisdiction of the military tribunals is not to be stretched by implication.

Records of courts-martial reveal that a number of civilians were tried prior to the Civil War in areas

where no hostilities appear to have been in progress." It is evident that before the Civil War the concept of "in the field" was not at all limited to a theater of operations in wartime. At the very least, it covered an organized camp in a remote place where the civil law of the United States was not functioning or could be reached only with difficulty.

It was with this background of practical interpretation of the constitutional power that the Judge Advocate General of the Army gave this opinion in 1866:³⁷

WAR DEPARTMENT,
BUREAU OF MILITARY JUSTICE,
November 15, 1866.

Respectfully returned to Bvt. Brig. Gen. Wm.
M. Dunn, Asst. Judge Adv. Genl.

It is held by this Bureau and has been the general usage of the service in times of peace, that a detachment of troops is an army "in the field" when on the march, or at a post remote from civil jurisdiction.

It has been the custom and is held to be advisable, that civil employees, sutlers and camp followers when guilty of crimes known to the civil law, to turn the parties over to the

³⁷ Fortress Monroe near Norfolk, Virginia (1825); Fort Washington, Maryland (1825); Fort Gibson, State unknown (1833); Fort Brooke, Florida (1838); Camp Scott, Utah Territory (1858); Fort Bridger, Utah Territory (1858); *The Ewing* (1849). These incidents are detailed at pp. 51-52 of the Government's Reply Brief on Rehearing in the *Covert* case.

³⁸ Opinion of the J.A.G. of the Army, Nov. 15, 1866, 23 Letters sent, 331 (National Archives).

courts of the vicinity in which the crimes were committed. For minor offenses against good orders and discipline, it has been customary to expel the parties from the Army: If, however, it is sought to punish civil employees in New Mexico, for crimes committed at a post where there are no civil courts before which they can be tried, it is held that they can be brought to trial before a General Court Martial, as they must be considered as serving with "an army in the field" and, therefore, within the provision of the 60th Article of War.

J. HOLT

Judge Advocate General

(iii) It is true that Winthrop thereafter expressed the view (p. 101) that the Article of War conferring jurisdiction on persons in the field "is deemed clearly to indicate that the application of the Article is confined both to the period and pendency of war and to acts committed on the theatre of the war." Winthrop assumed that "in the field" means "time of war" and then concluded that even those related Articles prescribing jurisdiction over connected civilians which do not contain the "in the field" phrase should be construed as being applicable only in time of war. What is ignored, however, is that the constitutional authority here involved is Clause 14, not the war power, and that the Congressional power under Clause 14 is "peace power" as much as "war power." The Constitution does not limit Congress to make regulations for the armed forces only when we are at war or to make regulations which would become operative only in time of war. And if a test of reasonableness is

applied to the exercise of jurisdiction over "civilians" under Clause 14, it would not automatically result in affirming military jurisdiction in time of war, while excluding it without more during periods when there are no declared hostilities. Absent such an inappropriate "automatic" test, the period of world tension during the present "cold war" with its concomitant world commitments of the United States surely provides ample justification for the application of court-martial power under Clause 14. See *infra*, p. 71 ff.

Moreover, a brief review of some of the conflicting opinions during the period when Winthrop wrote shows that there was no consensus of interpretation of the *constitutional* power supporting Winthrop's view. In 1872, the Attorney General issued an opinion, which Winthrop notes (at p. 101), that civilians serving with troops in Kansas, Colorado, New Mexico, and the Indian territory, at camps where it was necessary to build defensive earthworks and where persons had been killed by Indians, were "in the field." 14 Op. Atty. Gen. 22. The opinion rested primarily on the proposition that the words "in the field" imply military operations with a view to an enemy, and that an army was "in the field" when it was "engaged in offensive or defensive operations." But the opinion also noted, p. 24:

Possibly the fact that troops are found in a region of country chiefly inhabited by Indians, and remote from the exercise of civil authority, may enter into the description of "an army in the field."

Subsequently, the Attorney General ruled that civil engineers employed by the Navy were subject to court-martial jurisdiction. 15 Op. Atty. Gen. 597. This was done without considering the question of "in the field" at all, but on the theory that such engineers were an integral part of the Navy. A brief opinion of the Attorney General on June 2, 1876, that a quartermaster's clerk was amenable to court-martial jurisdiction (unpublished opinions, Letterbook No. 4, page 32), again without reference to the "in the field" problem, evoked a reaction from the Judge Advocate General of the Army. His two opinions on this subject (available only in the National Archives and printed in Appendix B to the Reply Brief for Appellant and Petitioner on Rehearing in *Covert*, at p. 86) brought a reversal from the Attorney General in his opinions of May 15, 1878 (16 Op. Atty. Gen. 13) and of June 15, 1878 (16 Op. Atty. Gen. 48). Since the case at this stage involved the general question of the status of quartermaster clerks and superintendents of national cemeteries, there was no issue of anyone's being in the field and the Attorney General explicitly did not consider the scope of that concept (16 Op. Atty. Gen. at 15).

The consequence of this holding that clerks and employees (not even alleged to be in the field) were not subject to court-martial jurisdiction seems to have been an uncritical acceptance of the general notion that no civilian could be tried by court-martial in time of peace. But all such statements were made with

reference to cases *within the United States*.” And with the passing of the frontier, the extension of civil jurisdiction throughout the country, and the end of the Indian wars, it is probably true that—barring unusual circumstances such as invasion, internal chaos, or great emergency—it was no longer possible to be “in the field” in the United States (*i.e.*, in an area where civilian courts could not operate).⁴⁰

(iv) Thus, the historical concept of “in the field” does not turn on peace or war but rather on the location of the military as a group apart in a defensive or offensive posture, or away from its own civil jurisdiction. Accordingly, the general historical rationale which justifies military jurisdiction over civilians with the forces in the field justifies the exercise of court-martial jurisdiction under Article 2(11) over

³⁹ At the time of World War I, the federal courts upheld courts-martial in the case of a quartermaster employee at Camp Jackson, South Carolina (*Hines v. Mikell*, 259 Fed. 28 (C.A. 4), certiorari denied, 250 U.S. 645), and of another quartermaster employee on the Mexican border where the troops he was with were concerned with the intermittent raids of bandits (*Ex parte Jochen*, 257 Fed. 200 (S.D. Tex.)). These cases were cited with approval by this Court, as reflecting a “well-established” power, in *Duncan v. Kahanamoku*, 327 U.S. 304, 313, fn. 7. See also *infra*, pp. 63–66.

⁴⁰ Doubtless, the doctrines of *Ex parte Milligan*, 4 Wall. 2—holding that martial law could not extend to civilians “in nowise connected with the military” (4 Wall. at 121–122) where the civil courts are available—were carried over into the different field of military jurisdiction over civilian employees serving with the armed forces “in the field” so as to exclude from the “field”, within this country, areas where the civil courts were open (at least in peacetime).

civilians who serve with or are employed by the forces in territory where the United States is not sovereign.⁴¹ The basic reason why these forces have been sent overseas is that they may be placed in a military posture with respect to a possible or potential enemy. And, clearly, American civil law, in its territorial phase, cannot be present where these troops are. See p. 83 ff; *infra*. Both of these factors indicate that the forces subject to Article 2(11) are "in the field" in the sense in which that phrase was understood when the Constitution was adopted.

e. *The Decided Cases*

The exercise of Congressional power to provide court-martial jurisdiction over non-uniformed or "civilian" persons has been tested and upheld in the federal courts. These decisions demonstrate at the least that civilian employees of the armed forces, under certain circumstances, can be included within the term "land and Naval forces" of Article I, Section 8, Clause 14.

(i) In a series of early cases, "civilian" paymaster clerks were held to be "in military [or naval] service" for court-martial purposes. *In re Thomas*, No. 13,888, 23 Fed. Cas. 931 (N.D. Miss.); *United States v. Bogart*, No. 14,616, 24 Fed. Cas. 1184 (E.D.

⁴¹ The Uniform Code of Military Justice uses the concept of "in the field"—in connection with court-martial jurisdiction over civilians—only for "time of war" (Article 2(10)). But the *constitutional* concept, as distinguished from its present statutory usage, is not so limited, and that concept supports the validity of Article 2(11). For, as we have pointed out, the latter provision covers troops stationed away from American civil jurisdiction.

N.Y.); *In re Bogart*, No. 1,596, 3 Fed. Cas. 796 (C.C. Calif.). This Court, when confronted with the same problem in *Ex Parte Reed*, 100 U.S. 13, scrutinized closely the connection between the Navy and paymasters' clerks and determined that for the purpose of military jurisdiction they would be considered "in the naval service." Likewise, in *Johnson v. Sayre*, 158 U.S. 109, where the lower court had issued a writ of habeas corpus on the ground that Sayre had been detained under sentence of infamous punishment, not in time of war or public danger, in violation of the Fifth Amendment, this Court, citing *Ex parte Reed*, *supra*, held that "He was * * * a person in the naval service of the United States, and subject to be tried and convicted, and to be sentenced to imprisonment, by a general court martial." 158 U.S. at 117.⁴²

⁴²The opinions of the Court in the cases involving exercise of court-martial jurisdiction over paymasters' clerks indicate that the Court was not concerned with whether the person was a "civilian" or an enlisted man or an officer. The concern of the Court, and the issue upon which all the cases seem to turn, is the "connection" with the Navy and whether it was such that the clerk be "in" the naval service within the meaning of the applicable statute conferring court-martial jurisdiction. This is illustrated by the case of *Ex parte Van Vranken*, 47 Fed. 888, 890, where the District Court for the Eastern District of Virginia, in granting the writ of habeas corpus, specifically held: "That clerks of naval officers doing duty on land in time of peace, appointed from civil life for periods terminable at the will of such officers, and liable to return to civil life whenever such employment ceases, are civilians, and not members of the military establishment of the navy, seems to me to be too clear to admit of doubt". This Court reversed *sub nom. McGlensy v. Van Vranken*, 163 U.S. 694, "on authority of *Johnson v. Sayre*", but did not dispute the finding of "civilian" status.

(ii) In World War I and again in World War II, military court-martial jurisdiction over civilians both in the United States and overseas was upheld under the terms of Article 2(d) of the Articles of War of 1916, 39 Stat. 651."

In *Hines v. Mikell*, 259 Fed. 28 (C.A. 4), certiorari denied, 250 U.S. 645, the court held that a civilian auditor working with the army in time of war, at Camp Jackson in the United States, was amenable to court-martial jurisdiction. *Ex parte Gerlach*, 247 Fed. 616 (S.D.N.Y.), dealt with an "employee" of the United States Shipping Board, who, having served on a ship transporting troops to Europe, was returned to the United States aboard an army transport. He first volunteered to stand watch, but later refused to continue. The court (Judge Augustus N. Hand) held that Gerlach was a person accompanying and serving with the Army of the United States when he disobeyed the order, and that he was therefore subject to the jurisdiction of the military for court-martial purposes. Another case was *Ex parte Falls*, 251 Fed. 415 (D.N.J.), where the petitioner, an employee of the Army Transport Service, who had been assigned to duty aboard an army transport ship docked at Bush Terminal, Brooklyn, attempted to leave the ship and desert the service, just before the ship sailed for a

⁴³ "All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles;".

foreign port. See also *Ex parte Jochen*, 257 Fed. 200 (S.D. Tex.)

In *Perlstein v. United States*, 151 F. 2d 167 (C.A. 3), dismissed as moot, *sub nom. Perlstein v. Hyatt*, 328 U.S. 822, a civilian employee of an Army contractor was stationed at a military base in East Africa occupied by American and British troops in World War II. He was subsequently ordered discharged by the United States Army officer in command and was to be sent back to the United States at the earliest opportunity. On the day of his departure he stole some jewelry and forged a receipt. After he had left the base, the theft was discovered and he was arrested on his arrival in Egypt and tried by court-martial. Military jurisdiction was upheld. A similar ruling was made in *In re DiBartolo*, 50 F. Supp. 929 (S.D.N.Y.), involving a mechanic employed by the Douglas Aircraft Company at its depot in Gura, Eritrea, in 1942; after he had been relieved of active duty because of illness he stole a diamond ring, and was tried and convicted by court-martial.

Other cases are: *McCune v. Kilpatrick*, 53 F. Supp. 80 (E.D. Va.) (a cook aboard a ship, under contract to the United States, carrying troops); *In re Berue*, 54 F. Supp. 252 (S.D. Ohio) (a merchant seaman aboard a vessel, which was part of a convoy proceeding to Casablanca, committed an assault); *Grewe v. France*, 75 F. Supp. 433, (E.D. Wis.) (a seaman left his employment with the Merchant Marine in November 1945, at Antwerp, Belgium, and thereafter secured employment with the army in Germany; subsequently, charges were preferred against him,

and although he terminated his employment prior to trial by court-martial, he was held subject to military jurisdiction). After the Korean conflict, see *In re Varney's Petition*, 141 F. Supp. 190 (S.D. Calif.) (a civilian employee of the armed forces in Japan who was tried and convicted by court-martial of having imported prohibited articles into Japan).⁴⁴

What emerges from these decisions is that, as this Court put it in *Duncan v. Kahanamoku*, 327 U.S. 304, 313, there is a "well-established power of the military to exercise jurisdiction over members of the armed forces [and] those directly connected with such forces * * *." (Emphasis added.)⁴⁵ That the itali-

⁴⁴ The United States Court of Military Appeals, which because of its experience in dealing with cases arising in the military services, may be deemed to have an unusually good grasp and understanding of the true military-civilian relationships on American bases in foreign countries, has repeatedly upheld the jurisdiction of courts-martial under the provisions of Article 2(11) of the Code. See *United States v. Marker*, 1 U.S.C.M.A. 393; *United States v. Weiman*, 3 U.S.C.M.A. 216; *United States v. Garcia*, 5 U.S.C.M.A. 88; *United States v. Robertson*, 5 U.S.C.M.A. 806; *United States v. Burney*, 6 U.S.C.M.A. 776. The United States Court of Military Appeals, of course, is "a court in every significant respect." *Shaw v. United States*, 209 F. 2d 811, at 813 (C.A.D.C.).

⁴⁵ In 1866, in the landmark case of *Ex parte Milligan*, 4 Wall. 2, 123, this Court stated it thus: "The discipline necessary to the efficiency of the army and navy, required other and swifter modes of trial than are furnished by the common law courts; and, in pursuance of the power conferred by the Constitution, Congress has declared the kinds of trial, and the manner in which they shall be conducted, for offences committed while the party is in the military or naval service. Every one connected with these branches of the public service is amenable to the jurisdiction which Congress has created for their government, and, while thus serving, surrenders his right to be tried by the civil courts." (Emphasis added.)

cized portion of the quotation referred to persons *employed* by the armed forces is indicated by the fact that it is supported in the footnote by some of the same civilian-employee cases which we have cited, e.g., *Ex parte Gerlach, supra*; *Ex parte Falls, supra*; *Ex parte Jochen, supra*; and *Hines v. Mikell, supra*.

2. *Respondent's connection with the armed forces is sufficiently close to subject him to military jurisdiction*

The historical survey we have just concluded shows that if the individual is a civilian with a clear and direct relationship to the armed forces, so that he can properly be said to be a part of them, military jurisdiction must be upheld (at least if civil jurisdiction is absent). This Court has recognized this general jurisdictional test. In *Duncan v. Kahanamoku*, 327 U.S. 304, 313, the term "directly connected" was used to indicate the degree of civil-military relationship which would justify the exercise of military court jurisdiction; in *Toth v. Quarles*, 350 U.S. 11, 15, it was stated that court-martial power was not limited to those who were members of the armed forces but that it extended to those who were a "part of" such forces; and in *Corcoran*, Mr. Justice Black's opinion recognized that a person may legally be "in" the military although he was not inducted and did not wear a uniform. 354 U. S. at 22-23. We believe that the respondent and others like him clearly meet this general criterion.

The obvious reason for Congressional provision for court-martial jurisdiction over such civilians connected with the armed forces is the fact that the

troubled international situation has made it necessary for the United States to deploy its armed forces throughout the world, sometimes in remote and isolated areas. These forces include sizeable civilian contingents who accompany, live with, and form integral parts of the military force. Substantial numbers of highly trained specialists and technicians, whose skills are not readily available in the uniformed services and cannot be supplied by training those in uniform, are essential to the daily problems of maintenance and administration arising from the intricate and complex technology of modern warfare. The use of foreign nationals is impractical in many instances both because of obvious reasons of security and because of the unavailability in many areas of adequate numbers of trained foreign personnel who could work efficiently with our military personnel. For these reasons American civilians must, as a practical necessity, be employed to perform duties essential to the operation of the armed forces. The requirement of adequate civilian specialists becomes increasingly great in the light of modern atomic and missile warfare.

These civilian employees of the armed forces overseas stand in an intimate and direct relationship with the military forces—they are members of the military community. The civilian employee has a direct and vital connection with the armed forces and their military mission. He works side-by-side with members of the armed forces on projects of military significance; he is subject to the control of military su-

periors in the performance of his assigned work; and, not infrequently, military personnel are subject to his control and direction. He enjoys the privileges, provided by the military, of use of the commissary and base exchange, he is furnished military medical and dental care, membership in clubs on the military base, and other benefits generally associated with membership in the armed forces. In addition to being transported overseas at government expense, these civilians are supplied passports which identify them as employees of the armed forces. They are admitted to the country in which they live without a visa because the particular armed force vouches for their behavior. They use military payment certificates, the armed forces' medium of exchange, and they have the benefits of the special armed services postal facilities, which are not available to Americans traveling abroad as tourists or on business. The benefits of this postal system include reduced overseas postal rates, special custom privileges, and availability of money order and other services of the Post Office Department. They enjoy the same tax exemptions, customs benefits, and border-crossing privileges as the uniformed members of the services. Both are permitted to import automobiles without tax in many countries where importation is strictly forbidden to others.

Schools are maintained at government expense for all children of the military community without regard to whether their parents are soldiers or civilians. Churches, theaters, clubs, tours, and sporting and cultural events are shared by civilian and military

members of the military communities overseas. Members of the civilian contingent are normally housed by the military. They are furnished heat, light, fuel, water, telephone and other services. They ride in military transportation, and their food, clothing and other necessities are available from sources maintained by the armed services. Special banking facilities, provided for the services, are utilized by these civilians, who also share with the military the protection of the military police. In many areas the forces make gasoline, oil, and parts available for private automobiles, and maintain service stations and garages. Also, in many areas they issue automobile license plates and drivers' licenses to military and civilian members of the community, and supervise the issuance and administration of automobile insurance for them.

These, as well as other factors, closely identify these civilians overseas with the armed forces. In every essential of their daily living their activities are interwoven with those of the military. Because they are so closely identified with the armed forces, the local populace in the various foreign areas look upon and identify these civilians only as members of the American military community. In most foreign countries, military personnel wear civilian clothes off the base. To the local population civilians and military are indistinguishable.

In sum, individuals of respondent's class meet *each* of the following factors showing closeness of "connection" with the military:

1. The duties of the person—the similarity or dissimilarity of those duties to the duties of uniformed personnel;

2. The place of performance of those duties—whether these duties are performed side-by-side with uniformed personnel, or whether they are performed in a separate and distinct locale;

3. The hierarchy of command—whether the person is subject to the orders and instructions of military personnel with reference to his work and duties;

4. The military privileges to which the person may be entitled—whether ~~he is~~ entitled to use the commissary, service club, and other military facilities normally reserved for uniformed personnel;

5. The absence of any local civilian status—whether the person is in any substantial relationship to the local civilian authorities, judicial or executive, or whether he is an integral part of the American military community, and whether there is a military responsibility for his conduct.

By the same tokens, under all the historical tests of military jurisdiction over civilian components, Article 2(11) is fully valid as applied to respondent's case. He is precisely like the "sutlers", the "retainers", the "drivers", the "wagon masters", the "gunners", the "commissaries", the "quartermasters", the "forage masters", the "paymasters", who have been treated as liable to court-martial—even though "no inlisted men". See *supra*, p. 29 ff. His situation at an Air Force Base in Morocco is "in the

field"—in the historical sense—especially since at that place “there is no Form of Our Civil Judicature in Force”. See *supra*, pp. 33, 52 ff. By the traditional standards he is part of, and “in”, our “land and naval Forces” for the purposes of Article I, Section 8, Clause 14, of the Constitution.

B. COURT-MARTIAL JURISDICTION OVER CIVILIAN EMPLOYEES AND DEPENDENTS ACCOMPANYING OR SERVING WITH THE ARMED FORCES OVERSEAS IS A PRACTICAL NECESSITY

1. *There are large numbers of civilians who must be abroad for the defense of the country*

Today, almost half-a-million American civilians are accompanying or serving with the military in dozens of countries on many bases around the globe. As of March 31, 1959, there were 25,585 American civilian employees and 455,086 American dependents accompanying the armed forces abroad. See the Appendix, *infra*, pp. 110–111. Most of the employees are in positions in which they cannot easily be replaced by men in uniform. In particular, there are several thousand contractor employees and technical representatives who are highly skilled technicians and advisers whose services are indispensable to a military force which must increasingly rely on ever-changing and ever-more-complicated scientific equipment. To suggest that the most practical solution is for the United States to send these men home is to argue that the country is constitutionally precluded from using the skilled talents of those civilians who are willing to come overseas to work with the military and willing to subject themselves to its jurisdiction.

As for dependents, it is clear that to forbid families from accompanying servicemen overseas would seriously affect morale, hamper recruitment, and thereby weaken the national defense. The situation today is not essentially different from that which faced Washington when he decided that he had to keep wives in the camp "or by driving them from the Army risk the loss of a number of Men, who very probably would have followed their Wives." "In a word, I was obliged to give Provisions to the extra Women in these Regiments, or loose by Desertion * * * some of the oldest and best Soldiers in the Service." (*Writings of Washington*, Vol. 26, pp. 78-79.) There is no question but that in the interests of self-defense in today's world the United States must be prepared to have some 455,000 dependents overseas living with their servicemen kin, in housing and using provisions and services made available by the United States. In short, there is no real alternative to the maintenance of large numbers of American civilians overseas accompanying, working with, and living with the military forces.

2. *Both employees and dependents create problems of discipline requiring the exercise of criminal jurisdiction*

a. *The magnitude of the problem*

As we have noted, the number of civilians accompanying the military abroad is now about 480,000. In contrast, the number of Americans in diplomatic and comparable missions abroad (together with their de-

pendents) number considerably less than 20,000.⁴⁶ The contrast between the number of military dependents and employees among whom order must be maintained and the small number of people connected with our diplomatic posts is brought out even more clearly by considering particular countries. In the United Kingdom, there were, at the end of 1956, over 46,000 military dependents, as contrasted with some 480⁴⁷ Americans connected with the diplomatic missions; in Japan, there were over 68,000 military dependents, as contrasted with some 758⁴⁸ Americans connected with the United States missions. From the point of view of numbers alone, it is clear that the problem of administering justice within American military communities numbering in the tens of thousands is not at all on a par with the problem of possible criminal acts committed by American diplomats abroad.

b. The number of offenses committed

There is no question but that there is a substantial criminal problem among the dependents and employees overseas. It does not reach the urban crime rate in the United States, but in groups as large as those here involved there exists a problem which cannot be ignored. The military dependents as a group are unlike the foreign service, not only in their size

⁴⁶ The figures as of December 31, 1956, are given in our Reply Brief for Appellant and Petitioner on Rehearing in the *Covert* case, at pp. 64-65.

⁴⁷ State Department, 164; International Cooperation Administration, 9; United States Information Agency, 19; plus estimated dependents, 288.

⁴⁸ State Department, 215; International Cooperation Administration, 25; United States Information Agency, 63; plus estimated dependents, 455.

but in their make-up. The foreign service is carefully selected and consists in large part of those making that service a career. One serious misstep—by the foreign service officer or his family—and the career may well be ruined. On the other hand, dependents accompanying the forces overseas have obviously had no prior selection (except by the individual members of the forces). The generally accepted standards of conduct among the military community are not as strict and the consequences of “getting caught” are not as serious to the dependent’s or to the serviceman’s future. Civilian employees are likewise not as carefully selected as members of the foreign service.

The Department of Defense has reported that between December 1, 1954, and November 30, 1958, there were 5,026 cases involving civilian employees and dependents which were subject to the primary jurisdiction of the foreign courts of the host nation. Such jurisdiction was waived to the United States in 4,051 cases, or 80%. The following table provides a more detailed breakdown of the cases subject to foreign primary jurisdiction:⁴⁹

⁴⁹ These figures do not include offenses committed by American civilians abroad who were subject to our primary or exclusive jurisdiction (for which statistics are not available). For example, in Germany, the United States has exercised exclusive jurisdiction as to all offenses of the civilian contingent, except only for capital offenses committed by dependents.

Type of offense (period 1 Dec. '54 to 30 Nov. '58)	Subject to foreign jurisdiction		Waiver of foreign jurisdiction obtained	
	Employees	Dependents	Employees	Dependents
Murder.....	1	2	0	1
Rape.....	3	1	3	1
Manslaughter (including negligent homicide).....	32	16	10	3
Arson.....	0	6	0	5
Robbery, larceny and related offenses.....	7	36	5	25
Aggravated assault.....	8	8	4	4
Simple assault.....	50	21	41	16
Offenses against economic control laws.....	231	54	36	41
Traffic offenses incl. drunken and reckless driv. and fleeing scene of accident.....	2,566	1,791	2,187	1,587
Disorderly conduct, drunkenness, breach of peace, etc.....	28	41	19	34
Other.....	36	88	14	15
Totals.....	2,962	2,064	2,319	1,732
Combined Totals.....	5,026		4,051	

Most of these offenses were handled administratively, but, as indicated by the table, there remains a residue of offenses which could appropriately be handled only by a criminal trial. As pointed out in our Supplemental Brief for Appellant and Petitioner on Rehearing in *Covert*, at pp. 30-31, in the fiscal years 1950-1956, there were 181 civilians tried by general court-martial by the Army, and 2,273 by special or summary court-martial (by the Army). See, also, *infra*, p. 79 ff.

c. The special status of the civilian contingent as an integral part of the armed forces overseas

These military civilians overseas are in a unique status. They are not tourists or casual visitors who should expect to be amenable to the jurisdiction and the legal systems of the country in which they travel. We have described their integration into the armed

services. *Supra*, pp. 66-71.⁵⁰ Not only the United States—through its legislative and executive branches—but the foreign governments have recognized the special status of these persons by making special provisions for them in the treaties governing the status of our military forces. For the most part, the American civilian contingent is satellited in or near military bases in American “communities” which are regulated by American authorities and policed by American military police.⁵¹ American civilian personnel accompanying the armed forces overseas find themselves in strange surroundings, unfamiliar with local laws and customs, generally unfamiliar with the language; and, because they live in American communities in these countries for periods of years, their lives are much more closely oriented to the armed forces and its facilities than is the case within the United States. The restrictions placed upon them and

⁵⁰ The situation of civilian components of a military force is different from that of many other United States civilians in foreign countries, not only because they live more in a United States enclave than do the others and their presence is less casual, but because less volition is involved in their coming to the foreign country. A United States citizen who chooses to tour or to live in a foreign country has chosen to put himself under foreign law. A United States soldier is in a foreign country because the United States has sent him there, and his family is there because he has been sent there. And while perhaps more volition is involved in the case of civilian employees of the armed services, they too are there because of the needs and calls of the United States. In many cases they belong to the career civil service and are required to serve a tour abroad which, because of career considerations, they can ill afford to refuse.

⁵¹ See, *e.g.*, par. 10, Article VII, NATO Status of Forces Agreement, T.I.A.S. 2846.

the rights, privileges, and protections which the American authorities are permitted to extend to them in the foreign countries depend for their existence on agreements made with the foreign governments. Generally, the exercise of United States military authority and the use of United States military facilities are permitted in order to make the American employees and dependents independent of the local economy. It is primarily the status of the individual as an employee or dependent of a member of the forces that determines his duties, rights, privileges, and protection.

The NATO Status of Forces Agreement and similar treaties take into account the unique position which American civilian employees and dependents occupy in the foreign country and place responsibilities for this group upon the American military authorities.⁵²

⁵² Article II, NATO Status of Forces Agreement, provides:

"It is the duty of a force and its civilian component and the members thereof as well as their dependents to respect the law of the receiving State, and to abstain from any activity inconsistent with the spirit of the present Agreement, and, in particular, from any political activity in the receiving State. It is also the duty of the sending State to take necessary measure to that end."

Par. 5(a), Article VII, provides:

"The authorities of the receiving and sending States shall assist each other in the arrest of members of a force or civilian component or their dependents in the territory of the receiving State and in handing them over to the authority which is to exercise jurisdiction in accordance with the above provisions."

Par. 3, Article XIII, provides:

"The authorities of a force shall render all assistance within their power to ensure the payment of duties, taxes and penalties payable by members of the force or civilian component or their dependents."

The military are responsible for the protection and behavior of the American civilian employees and dependents, as well as for American personnel in uniform. In the United States, an offense of a civilian employee or dependent is dealt with by state authorities as they would deal with the case of any civilian. Overseas it is different. American military police have been permitted to perform their functions with respect to American personnel wherever they may be (subject to limitations imposed by American law and by arrangements with the foreign country), and American military tribunals have been permitted to take cognizance of all sorts of offenses committed by American civilians on foreign soil.

For these reasons, the military authorities must play a major role in the relations of these civilians with the host country; this is manifested (in part) by the willingness of foreign nations to relinquish to courts-martial jurisdiction in cases such as that with which we are here concerned. The military have the responsibility of operating the military community in such a way as to give the best possible impression of the United States to the people in foreign areas. Also, in the final analysis it is the United States military who have the responsibility, at an overseas base, of maintaining the armed forces at that base—with all their technical and logistical support—in a state of combat readiness to meet any eventuality. See, further, *infra*, p. 79 ff.

d. *The need for court-martial jurisdiction*

In connection with the reargument of the *Covert* case, the Department of Defense solicited from overseas commanders their views concerning the necessity for court-martial jurisdiction. Without exception, these commanders stated that discipline would be disrupted, morale impaired, and ability to perform the assigned mission reduced if jurisdiction under Article 2(11) were lost. Some of the replies were printed as Appendix A to the Supplemental Brief for Appellant and Petitioner on Rehearing in *Covert*.

The basic theme running through all the replies was that responsibility cannot be divorced from effective power to control. First, there is the military mission itself, and the need to protect it. Then, the continued willingness of foreign governments to allow United States troops to remain within their territory may depend upon the ability of the military commander to maintain law and order. To hold that the United States did not have the constitutional power to give its military commanders authority over military dependents and employees overseas would make some foreign governments less willing to accept United States contingents in their territory and to this extent would weaken the military defense of the United States and the free world. To the local population civilians and military are indistinguishable. As a corollary, the local populace naturally—and rightly—expects the military commander to supervise and control this civilian contingent. Without the existence of deterrent

power with respect to these civilians, the commanders' efforts to maintain the smooth community relationships necessary to successful fulfillment of his mission in a foreign land would be seriously impaired. Finally, the commanders have the underlying responsibilities of providing for the security, health, welfare, schooling, religious activities, and physical safety of all of the members of the military community. To discharge these responsibilities the commander must have some control over the activities of his charges. He must be able to prevent and deter activities which would jeopardize the security and effectiveness of his command and he must be able to protect his personnel from one another.

In large part, commanders attempt to meet these heavy responsibilities by the promulgation of orders, regulations, and other directives applicable to the personnel of their commands, and covering various phases of the activities of military and civilian personnel. But if the commander has no jurisdiction over the civilians, he has no effective means of enforcing his orders as to them. A man or woman in civilian clothes could violate the orders with impunity, whereas a man or woman in uniform could expect to be punished for a similar violation. For example, if there is no power to enforce security regulations as to the civilian contingent, the commander's directives become almost meaningless as to them, and the very security of the command might be impaired or undermined.

The fact is that all kinds of violations by the civilian part of our military contingent—whether stealing or the introduction of narcotics, or black-marketeering, or neglect of safety regulations—necessarily affect the military portion of the contingent and the group as a whole and reflect on the status of our contingent as visitors in a foreign land. It would be unfair to permit a civilian to violate the commander's directives concerning security, black-market activities, illegal money conversions, postal operations, banking, ownership and operation of automobiles, entering off-limits areas, etc., with impunity, while the soldier working at the next desk or living across the hall is tried by court-martial for participating with the civilian in the very same offense. Such a situation is contrary to one of the cardinal principles of maintaining order in a military community (or any other community), *i.e.*, the fair, just, and equal treatment of all its members. Illustrative of this problem is the present case with its anomalous situation of two out of three co-conspirators standing convicted and being punished juxtaposed to the third conspirator—respondent Guagliardo—who may go unpunished despite the fact that he was equally guilty of the acts charged and equally a part of the military command. All three defendants in this case were members of the same military installation; they had the same commanding officer; they had practically identical rights and privileges at the installation; they committed the same offense.

In addition to the factor of inequality, it is obvious that administrative remedies are not adequate to deal with felonious offenses or the more serious misdemeanors. It is a basic premise of our law that the power to impose fines and imprisonment is the most effective governmental means of deterring infractions. Moreover, to deprive an employee of commissary privileges might either be ineffective as punishment, as in Paris where other supplies are available, or out of the question, as on a Greenland air base where no other food is available except that provided by the United States. Sending an employee back to the United States deprives the government of the services of a man who would not be there unless his services were required, and may in many cases be no deterrent at all. Sending a dependent back to the United States enforces that separation which the program of having dependents overseas is designed to avoid, and may also, in many instances, have no deterrent effect. In either case, the "remedy" is costly and injurious to the accomplishment of the military mission.

It may properly be assumed, we suggest, that cases which can adequately be handled by administrative disposition are now being handled in that way, since this is easier than conducting a court-martial. The fact that in many cases the commanding officer has found that a court-martial was required to consider and, if need be, punish civilians under his command demonstrates that those responsible for the success of our military missions overseas cannot maintain effective control without criminal jurisdiction.

C. THERE ARE NO ACCEPTABLE ALTERNATIVES TO THE
EXERCISE OF COURT-MARTIAL JURISDICTION

Four possible alternatives to court-martial jurisdiction exist: (1) trial in foreign courts; (2) trial in Article III courts sitting in the United States; (3) trial in Article III or legislative courts sitting in foreign countries; and (4) elimination of American civilian employees from the forces overseas, and elimination of facilities for moving and maintaining dependents overseas. None of these alternatives is adequate; at the least, Congress could reasonably decide that none of the alternatives should be adopted, but that present-day conditions require that court-martial jurisdiction be maintained over the civilian contingent of the armed forces abroad. In their opinions in *Covert*, Justices Frankfurter and Harlan acknowledged that it was a question of judgment—akin to an issue of due process—as to whether a trial by court-martial was permissible, in the light of the “particular local setting, the practical necessities, and the possible alternatives” and in view of the demands of the Constitution as a whole. 354 U.S. at 43-44, 64, 74-75.

1. *Trial in Foreign Courts*

A sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction. *Schooner Exchange v. McFaddon*, 7 Cranch 116, 136; *Wilson v. Girard*, 354 U.S. 524. At the present time, if the offense has been made an extraterritorial one under the laws of the United States, jurisdiction may be exercised by the

United States only if the offender voluntarily returns to the United States or if the United States is successful in securing his extradition. As our present extradition treaties do not appear to cover offenses committed in foreign countries," any alternative to the exercise of court-martial jurisdiction must be considered in the light of what is or may be agreed to by the foreign country, and secondly what is, or may be, acceptable to the United States.

a. It appears unlikely that a foreign government would object to the principle of trying American civilian employees and dependents in its courts for violations of its laws. In fact, foreign courts now try civilian employees and dependents in many cases. However, if the offense involves only American personnel or property, it cannot be expected in every case that the jurisdiction of the foreign tribunals will be invoked with the same vigor as if foreign nationals or property were involved.

As the United States Court of Military Appeals stated in *United States v. Burney*, 6 U.S.C.M.A. 776, 800:

Going from this case to areas far more damaging to the combat readiness of an overseas

⁵³ The treaties normally apply when the crime is "committed within the jurisdiction of one of the contracting Parties," and the offender "shall seek an asylum or be found within the territories of the other." Treaty with France for the Extradition of Criminals, Jan. 6, 1909, Art. I, 37 Stat. 1527, T.S. 561. See also Extradition Treaty with Great Britain, Dec. 22, 1931, Art. 1, 47 Stat. 2122, T.S. 489. Moreover, the treaties generally cover only major common-law types of crimes recognized by both nations. 4 Hackworth, *Digest of International Law*, 41-45.

command, it is readily ascertainable that black market transactions, trafficking in habit-forming drugs, unlawful currency circulation, promotion of illicit sex relations, and a myriad of other crimes which may be perpetrated by persons closely connected with one of the services, could have a direct and forceful impact on the efficiency and discipline of the command. One need only view the volume of business transacted by military courts involving, for instance, the sale and use of narcotics in the Far East, to be shocked into a realization of the truth of the previous statement. If the Services have no power within their own system to punish that type of offender, then indeed overseas crime between civilians and military personnel will flourish and that amongst civilians will thrive unabated and untouched. A few civilians plying an unlawful trade in military communities can, without fail, impair the discipline and combat readiness of a unit. At best, the detection and prosecution of crime is a difficult and time-consuming business, and *we have grave doubts that, in faraway lands, the foreign governments will help the cause of a military commander by investigating the seller or user of habit-forming drugs, or assist him in deterring American civilians from stealing from their compatriots, or their Government, or from misusing its property.* [Emphasis added.] "

" See also, the letter to The Adjutant General, Department of the Army, of November 29, 1956, from the Commanding General, Advance Section (7965), USAREUR Communications Zone (Brig. Gen. W. R. Woodward) :

* * * The French have little interest in trying cases not subject to their primary jurisdiction, and there is much diffi-

That the foreign governments do not now exhibit special concern with prosecuting American civilian employees and dependents is attested by the high percentage of cases—about 80%—in which the foreign governments have chosen to waive their jurisdiction. See *supra*, pp. 74–75. To deprive the United States of the power to try these offenders by court-martial will, as pointed out below, prevent the United States, as a practical matter, from exercising any criminal jurisdiction in most cases. We have already discussed the need for criminal penalties (*supra*, pp. 79–82). And the absence of criminal penalties would assume particularly great significance for the multitude of police-type regulations—such as traffic, health, and economic

culty for them in doing so. Where one American has injured another, the witnesses, the background, and the relevant social customs are equally foreign to the French court. Imprisonment of the guilty party costs French money. Investigation of the case costs French money. It is doubtful whether the French would be interested in going to the trouble or expense of prosecution and conviction, unless French nationals or property were involved. * * * [Appendix A, p. 98 at 103, to Supplemental Brief For Appellant and Petitioner on Rehearing in *Reid v. Covert* and *Kinsella v. Krueger*, Nos. 701 and 713. O.T. 1955].

Likewise, in a letter dated November 29, 1956, to the Judge Advocate General, the Commander of the Naval Forces, Far East, explained:

Our experience in Japan indicates that the Japanese for political reasons are much more interested in the right to exercise criminal jurisdiction than in its actual exercise. In only a small percentage of cases do they now exercise jurisdiction when they have the primary right. There is serious doubt that they could be prevailed upon to accept jurisdiction of cases where only American personnel and American property were involved. * * *. [*Id.*, p. 115 at 117].

control measures—the violation of which carries a relatively small degree of moral taint which otherwise might act as a deterrent.

b. Moreover, in several important areas the foreign criminal sanctions will be totally inadequate to cope with the criminal misconduct of Americans abroad. Foreign courts cannot exercise jurisdiction over offenses peculiarly punishable by the law of the United States. In this category are many violations of regulations governing a particular overseas area which are made punishable as violations of Article 92 of the Uniform Code of Military Justice, 10 U.S.C. 892. Under this Article are enforced many important regulations pertaining to the security of the United States and of our bases abroad, and significantly for the Far East in particular, those relating to the traffic in drugs. Crimes involving graft and bribery, frauds against the United States, and other serious offenses against the United States are made punishable by the Uniform Code of Military Justice. While it may perhaps be possible to punish the most serious of these acts by trial in federal courts in the United States (see *infra*, p. 90 *ff.*), resort to foreign courts will usually be impossible.

c. From the viewpoint of the American contingent generally (as distinguished from a particular convicted defendant who hopes to gain an immediate advantage from a lack of jurisdiction), the right to be tried under United States law has substantial advantages. It is not a reflection on the standards of other countries to recognize the Congressional judgment that members of United States military components should, so far as possible, be tried under United States mili-

tary law rather than the law of a foreign state where our forces happen to be stationed because of United States military commitments.⁵⁵ To a certain extent, judicial procedures provided by some of the foreign governments would fail to accord to an accused rights which we in the United States have considered important in our judicial proceedings. In a number of countries, a trial may be conducted without the presence of the defendant. The right against self-incrimination, the right to cross-examine, and other safeguards would not be available in the form known here to Americans who must stand trial in some of the countries where they are stationed. Unfamiliarity with the forms of procedure in itself results in hardship. And leaving out all other points of difference, it is to be remembered that the mere fact that proceedings would in most countries be conducted in a foreign language in itself raises problems for any defendant.

Problems arise also for the defendant with respect to a sentence imposed by a foreign court. The conditions of imprisonment vary and cannot be controlled by the United States. Incarceration in a for-

⁵⁵ The sentiments of the United States public, as reflected in Congressional policy, seem to be that trial under United States law is the preferred alternative; this sentiment was reflected in the advice and consent to the ratification of the NATO Status of Forces Agreement (4 U.S. Treaties, 1792, 1828) and in supplementary agreements with other countries. It has been the policy of this Government, in a large majority of the instances where the problem has arisen, to seek waivers from foreign governments of their primary right to exercise jurisdiction over our nationals in uniform or accompanying our armed forces as civilians. See *supra*, pp. 74-75.

eign jail is more onerous because of differences in language and nationality. The prisoner will usually be less accessible to family and visitors, and rehabilitative efforts, clemency, and parole procedures may be expected to vary considerably from those familiar to us. Parole may be denied by the foreign authorities because of their inability to supervise the parolee after his return to the United States.

All of these problems are, of course, aggravated if trials must be had in countries with judicial systems sharply alien to the fundamental traditions of the United States. Indeed, even with respect to those countries which are members of NATO, the United States insisted on specific procedural safeguards to insure a fair trial of our citizens abroad.⁵⁶

⁵⁶ North Atlantic Treaty, Status of Forces Agreement, Art. VII, Sec. 9, T.I.A.S. 2846:

"9. Whenever a member of a force or civilian component or a dependent is prosecuted under the jurisdiction of a receiving State he shall be entitled—

"(a) to a prompt and speedy trial;

"(b) to be informed, in advance of trial, of the specific charge or charges made against him;

"(c) to be confronted with the witnesses against him;

"(d) to have compulsory process for obtaining witnesses in his favour, if they are within the jurisdiction of the receiving State;

"(e) to have legal representation of his own choice for his defence or to have free or assisted legal representation under the conditions prevailing for the time being in the receiving State;

"(f) if he considers it necessary, to have the services of a competent interpreter; and

"(g) to communicate with a representative of the Government of the sending State and, when the rules of the court permit, to have such a representative present at his trial."

An identical provision is found in our Status of Forces Agreement with Japan. T.I.A.S. 2887.

2. Trial in Article III Courts Sitting in the United States

a. Even if the offense is one over which the United States has exclusive jurisdiction because it is not punishable by the law of the foreign country, the present NATO Status of Forces and similar Agreements permit the exercise of criminal jurisdiction within the receiving State only by the military authorities of the sending State to the extent that jurisdiction is conferred on them by their law. See Art. VII, T.I.A.S. 2846 at 6. A decision that civilian employees and dependents overseas are not subject to military jurisdiction would mean that there is no present authority in the treaties for the arrest or detention for removal to the United States of civilian employees or dependents who are accused of a crime against the United States. To provide for trial in the United States, special agreements with foreign countries would have to be negotiated. Our present extradition treaties appear not to cover this situation (see footnote 53, *supra*), as they generally apply only where the offense is committed within the territory of the State asking extradition, and also usually apply only to the major common-law crimes recognized by both countries. In the absence of a voluntary return of an offender, therefore, the United States could effectively assert jurisdiction only to the extent that new agreements could be obtained, or in cases in which the foreign country expelled the individual and returned him involuntarily to the United States.

Negotiations for new agreements to provide for extradition of offenders would undoubtedly be difficult, particularly if the offenses for which extradition is sought are cognizable under the laws of the host country.

As pointed out in Snee and Pye, *Status of Forces Agreement: Criminal Jurisdiction* (1957) (p. 44):

In the final analysis, however, the suggestion that dependents be tried by American civilian courts for crimes committed in other NATO countries overlooks the fact that the sole ground for a claim of jurisdiction by the sending State over its dependents is their intimate relationship to the armed force or civilian component of whose members they are dependents. If that relationship is so tenuous or non-existent that it will not afford constitutional sanction for the exercise of jurisdiction by a military court, there would seem to be no basis for the sending State to claim, nor for the receiving State to grant, the right to exercise criminal jurisdiction over dependents for conduct which also constitutes an offense against the law of the receiving State, any more than in the case of ordinary tourists.

As appears from the correspondence between the United States and the United Kingdom during the pre-NATO period (which was set forth in the Appendix to the government's original brief in *Covert*, pp. 78-84), the consent by the United Kingdom to our exercise of jurisdiction even over members of our armed forces for trial in that country represented a "very considerable departure * * * from the tra-

ditional system and practice." The traditional British view is that members of visiting forces are completely subject to the jurisdiction of the local courts. See Barton, *Foreign Armed Forces: Immunity From Criminal Jurisdiction*, 27 British Year Book of International Law 186. The United States, for itself, insisted in Section 2 of the Service Courts of Friendly Foreign Forces Act (22 U.S.C. 702) that trial by service courts of foreign countries take place "within the United States." The same section provides that where the offense is against a member of the civilian population the trial shall not only be within the United States but "within a reasonable distance from the place where the offense is alleged to have been committed." This position heretofore taken by the United States and other countries provides no support for the conclusion that any government would relinquish jurisdiction to another state for trial abroad for conduct which is a crime under its own law and which was committed in its territory.

b. Even if the consent of the foreign governments could be obtained, there are numerous difficulties inherent in the exercise of jurisdiction in the United States which would limit its use for all but the most serious offenses. The very remoteness of the trial would lessen the chance of prosecution for a large number of crimes for which criminal sanctions are required.

The offenses committed by military employees and dependents abroad can be broken down into four categories. *First*, there is a vast number of minor

traffic offenses, and other minor infractions of rules such as disturbing the peace. Most of these are dealt with administratively, some by summary court-martial. It may surely be assumed that those cases would not be taken to the United States for trial.

The *second* category includes the serious automobile violations, such as drunken and reckless driving, and comparable lesser crimes. Experience in all commands in this country and abroad demonstrates that such offenses require the criminal sanction of substantial fines and jail sentences which may or may not be suspended. Numerically, these are the most common offenses by civilians which have been handled by court-martial jurisdiction overseas. Should punishment for these offenses require transferring the accused and witnesses to the United States for trial, it may be a foregone conclusion that the offenses would go unpunished. To inflict, say, a fine of \$250 and a five-day sentence, few commanding officers would recommend that the government spend perhaps thousands of dollars for transportation and take two or more men away from their work for at least a week. Aside from the expense, the foreign witnesses may well not be available to come here, and they cannot be compelled to do so, in the absence of some special arrangement with the host country. The crime would go unpunished and, in a group of some 455,000, it may again be assumed that the consequence of lack of punishment would be an increase in crime. The *third* category is comprised of the common felonies including larceny, assault, converting gov-

ernment property, etc., and also includes the economic crimes of black market activity and smuggling on an organized basis. Here, criminal penalties are obviously called for, but once again it is doubtful whether there would be sufficient sureness of a trial in the United States to act as an adequate deterrent. Too often, the difficulties of obtaining permission from the foreign government, arranging for witnesses,⁵⁷ and disruption of local operations would appear to outweigh the necessity of punishing the particular crime.

The *fourth* category, in which there are few cases, is that of the truly major crimes. For these, and for some of the felonies in the third category, attempt would probably be made to arrange for trial in the United States. There would still be the problem of bringing witnesses to the United States—a problem which in the past has proved serious for both the government and defendants. For the government, two of the most common type of witnesses whose presence is required are co-conspirators and local police officials. In the case of organized smuggling or black-market activities, the co-conspirators are usually foreign citizens who have violated their own laws. Experience shows that they are unwilling to come to the United States to testify, even should their government be willing to let them out of the jurisdiction, which it frequently is not. Where local

⁵⁷ In this connection, it must be remembered that the defendant would have the burden of securing and transporting witnesses, including non-Americans, unless Congress made some special provision.

police and other officials are witnesses, there have in the past been problems in arranging to have them come to the United States. Where other citizens of the foreign country are the witnesses, they frequently decline to come so that they will not become involved. The local government, which would lend its process to make them available within its country, will not, and usually cannot, require them to go to the United States to testify. Depositions for the prosecution in criminal cases might well be barred by the Sixth Amendment. See *Dowdell v. United States*, 221 U.S. 325, 330.

In all types of cases tried in the United States, there would be the recurring problems of (i) lack of prompt and local punishment, (ii) the disruption of discipline and morale by having one system of justice for the military and another for the civilian contingent, (iii) the prosecution of joint offenses (as in the present case) committed by members of both contingents, and (iv) the delays and difficulties which are always incident to a distant trial far from the true venue of the crime.

3. *Trial in Article III Courts or in Legislative Courts Sitting in Foreign Countries*

a. Any request to a foreign country to permit the United States to establish a system of civilian courts to sit in its country and try American civilians who accompany the armed forces is bound to imply that a fair trial is not available in that country. There is an historical tradition in many countries, including the United States, that the country of a visiting mili-

tary force may exercise jurisdiction over its troops under its own law. See *Schooner Exchange v. McFaddon*, 7 Cranch 116, 139; *Tucker v. Alexandroff*, 183 U.S. 424, 433. As previously indicated (*supra*, p. 77 ff.), it was a recognition by foreign countries that civilian employees and dependents are an integral part of the visiting force that was the basis for asking military jurisdiction over them in the Status of Forces and related Agreements. It was also this recognition that led the Government of the United Kingdom to pass a statute⁵⁸ similar to Article 2(11) of the Uniform Code of Military Justice.

The concept of a civilian judicial system, divorced from the military authority, sitting in a foreign country, has as an historical precedent only the extraterritorial courts which existed for many years in countries then considered not to have an enlightened judicial system. History tells of the feelings aroused by the presence of such extraterritorial courts which these countries regarded as an infringement upon their sovereignty. Some foreign nations in which our troops are now stationed have insisted on removal of extraterritorial courts from their countries,⁵⁹ and it would be unrealistic to suppose that they would consent to their reinstatement. Even the debates in the British House of Commons before passage of the Vis-

⁵⁸ Section 209, Army Act, 1955, 3 & 4 Eliz. 2, c. 18.

⁵⁹ *E.g.*, Japan succeeded in 1899 in releasing itself from the limitations imposed on its sovereignty by the exemption of aliens from its local jurisdiction. Fenwick, *International Law*, 3d ed., 273. The United States acceded to a treaty with Turkey in 1931 which recognized the abolition of extraterritorial courts. 28 Am. Jour. Int'l Law (Supp.) 129-130 (1934).

iting Forces Act implementing the Status of Forces Agreement revealed strong opposition to recognition of any American jurisdiction.⁶⁰ See also *Criminal Jurisdiction Over Civilians Accompanying American Armed Forces Overseas*, 71 Harv. L. Rev. 712, 715.

Whereas many countries historically have been willing to cede a portion of their civil jurisdiction to their own military tribunals, and for similar reasons to the military tribunals of allied forces, there is no reason to expect that they would, in this day and age, surrender jurisdiction to a foreign civil tribunal sitting within their territory.

Since the present case arose in Morocco, it is pertinent to note that in June 1956 the United States relinquished consular jurisdiction in that country by Joint Resolution of Congress, S.J. Res. 165, 70 Stat. 773, see Senate Report No. 2274, 84th Cong., 2d Sess., June 19, 1956. At the time the Joint Resolution was under consideration by the Congress, the Secretary of State in his recommendation to the Senate Committee on Foreign Affairs stated pointedly that the relinquishment of this jurisdiction appeared as "the only course in keeping with the high traditions of United States policy and with our sympathies for the aspirations of peoples moving along the road toward self-government" (Senate Report No. 2274, *supra*, p. 2). The remarks made to the Senate by Senator Smith of New Jersey, concurring with the views of Senator George, Chairman of the Foreign Re-

⁶⁰ 505 House of Commons Debates 561, 586 (1952).

lations Committee, characterized the situation in equally strong and unequivocal terms (102 Cong. Rec. 11698):

Mr. President, it is very important, too, that all of us recognize that the purposes of the joint resolution are fully in accord with America's traditions. A new Morocco has come into being. As it assumes the responsibilities of self-government, it is fitting that we assist it to attain a status of equality with other nations. By voluntarily renouncing the outmoded concept of extraterritoriality, we shall again demonstrate to the world our sympathy with the aspirations of those who have achieved self-government and the rights and responsibilities appurtenant thereto. The exercise of extraterritoriality to many is tinged with colonialistic connotations, which it is in our interest to erase.

b. Even if the improbable occurred and the nations in whose territories we maintain forces did consent to the establishment of Article III or legislative civilian courts within their territories, numerous difficulties would still remain.⁶¹ A complete substan-

⁶¹ These difficulties were summarized by Mr. Justice Clark, dissenting, in *Covert*, 354 U.S. at 87-88:

"These constitutional courts would have to sit in each of the 63 foreign countries where American troops are stationed at the present time. Aside from the fact that the Constitution has never been interpreted to compel such an undertaking, it would seem obvious that it would be manifestly impossible. The problem of the use of juries in common-law countries alone suffices to illustrate this. Obviously the jury could not be limited to those who live within the military installation. To permit this would be a sham. A jury made up of military personnel would be tantamount to the personnel of a court-

tive and procedural criminal code would have to be enacted by the Congress. Establishment of legislative courts would add a system of courts to those already in existence; it would also create new constitutional problems which at a minimum would leave in doubt for many years the legality of trials held under the new jurisdiction.

Establishment of Article III courts also would evoke many problems. Presumably a roving United States court would be provided which would try civilians in the overseas areas. If this were done, delays would be inevitable and unusual expenses would be encountered, preventing trial in all but the most serious cases unless the judge happened to be in the locality where a lesser crime was committed. There would be problems with respect to bail. Recruiting of petit and grand juries would be difficult, particularly if military personnel were exempted from jury duty, as is now the case in the United States.

In sum, exercise of jurisdiction by Article III or legislative civilian courts sitting in foreign countries

martial to which the former minority objects. A jury composed of civilians residing on the military installation is subject to the same criticism. If the jury is selected from among the local populace, how would the foreign citizens be forced to attend the trial? And perchance if they did attend, language barriers in non-English-speaking countries would be nigh insurmountable. Personally, I would much prefer, as did Mrs. Madsen, that my case be tried before a military court-martial of my own countrymen. Moreover, we must remember that the agreement of the foreign country must be obtained before any American court could sit in its territory. In noncommon-law countries, if such courts were permitted to sit—a doubtful possibility—our jury system would be tossed about like a cork on unsettled waters.”

is an impractical alternative. Agreement by the foreign country to the exercise of this jurisdiction is highly unlikely. Suitable legislation would be difficult, and even if it could be obtained it would be open to continuous constitutional challenge, to the extent that any constitutional privileges now available within the United States in Article III courts would not, or could not, be provided. Indeed, it would probably be difficult even to undertake negotiation with foreign countries unless the full extent of the substantive and procedural provisions were already known.

4. *Recall of Civilians*

One final alternative would be to employ only military personnel for overseas duty and to refrain from sending any dependents of servicemen overseas. We have pointed out (*supra*, pp. 66-67, 71-72) that this is a deceptively simple but totally unrealistic solution. It would mean that the United States would be denied the services of many competent and highly experienced employees—from clerks to highly skilled technicians, many of them irreplaceable, in any realistic sense, by military personnel. It would also mean that military families would be separated for extended periods of time, with serious effects on morale and discipline. The increased difficulty of securing capable persons who would make military life a career under such circumstances is apparent.

The sum of it is that, as to many of the offenses which may be committed by the civilian contingent overseas, the true alternative to court-martial juris-

diction is trial under foreign law in foreign courts, a solution against which Congress has opted and which creates serious difficulties and incongruities. As for offenses which are not crimes under the law of the foreign country, the alternative in all but rare instances is, in actuality, no trial at all.

III.

THE PROCEDURES PROVIDED BY COURT-MARTIAL ARE FAIR

As we have just pointed out, the real choice is between trial by court-martial, on the one hand, and trial and punishment by a foreign court, or no trial at all, on the other. In this comparison, the present court-martial system does not lag behind. Whatever evils may have existed in the past, a person who is tried by general court-martial today under the Uniform Code of Military Justice is surrounded by safeguards at every step in the proceedings.⁶²

When a suspect is first questioned by the military authorities or agents before charges have been preferred, he must be informed of the nature of the accusation and advised that he does not have to make

⁶² All the accused in this series of cases were tried by general court-martial, the only court-martial with jurisdiction to adjudge confinement in excess of six months. UCMJ, Articles 18, 19, 20. As a practical matter, it is rare for confinement to be executed in the case of a civilian unless adjudged by a general court-martial. Confinement of women is prohibited by regulations unless the sentence is to confinement for one year or more, as the services have no confinement facilities for women. Army Regulations 633-45, 19 August 1957; Air Force Manual 125-2, Sept. 1956, p. 29; Bureau of Naval Personnel Manual C-7813A.

any statement regarding the offense of which he is suspected, and that any statement made by him may be used in evidence against him in a trial by court-martial.⁶³ Unless he is so warned and actually understands the nature of the warning,⁶⁴ any statements made by him, as well as any evidence obtained through the use of such statements,⁶⁵ are inadmissible in evidence against him.⁶⁶ When the charges are preferred, the accuser must sign them under oath, stating that he has personal knowledge of, or has investigated, the matters set forth and that they are true to the best of his knowledge and belief.⁶⁷ Immediate steps are taken to dispose of the charges, and the accused is informed of the accusations against him.⁶⁸ A pre-trial investigation, judicial in nature, is held.⁶⁹ At that investigation, the accused is entitled to be represented by legally-qualified counsel,⁷⁰ without charge, and is given the opportunity to cross-examine witnesses against him and to present anything in his own behalf, either in defense or in mitigation. The investigating officer examines available witnesses requested by the accused. Statements obtained from unavailable witnesses and considered by the investigating officer must have been made under oath.⁷¹ A

⁶³ UCMJ, Art. 31(b).

⁶⁴ *United States v. Dixon*, 8 U.S.C.M.A. 616.

⁶⁵ *United States v. Haynes*, 9 U.S.C.M.A. 792.

⁶⁶ UCMJ, Art. 31(d).

⁶⁷ UCMJ, Art. 30(a).

⁶⁸ UCMJ, Art. 30(b).

⁶⁹ UCMJ, Art. 32; *United States v. Samuels*, 10 U.S.C.M.A.

⁷⁰ *United States v. Tomaszewski*, 8 U.S.C.M.A. 266.

⁷¹ *United States v. Samuels*, *supra*.

summary of the testimony taken on both sides is forwarded with the charges, and a copy is given to the accused. Accordingly, unlike the grand jury, the Government discloses its witnesses and evidence.⁷² The pretrial investigation "operates as a discovery proceeding for the accused and stands as a bulwark against baseless charges."⁷³ Before the court-martial convening authority directs trial on the charges, he obtains the advice and recommendation of his staff judge advocate, a qualified lawyer.⁷⁴ After the charges are referred for trial, a copy is served on the accused, who cannot, against his objection, be brought to trial within a period of five days subsequent to the service of charges;⁷⁵ and, if warranted by the circumstances, additional time in which to prepare the defense case must be provided.⁷⁶

The accused is given a prompt trial,⁷⁷ open to the public and to representatives of the press (except in the rarest of cases).⁷⁸ Presiding over the trial is an impartial, qualified lawyer—the law officer.⁷⁹ A verbatim record of the proceedings is kept;⁸⁰ if necessary, an interpreter is provided.⁸¹ The accused

⁷² *United States v. Craig*, 22 C.M.R. 466 (1956), affirmed, 8 U.S.C.M.A. 218.

⁷³ *United States v. Samuels*, *supra*, at 212.

⁷⁴ UCMJ, Art. 34(a).

⁷⁵ UCMJ, Art. 35. This provision operates in time of peace only.

⁷⁶ *United States v. McFarlane*, 8 U.S.C.M.A. 96.

⁷⁷ UCMJ, Arts. 10, 30, 33.

⁷⁸ *United States v. Brown*, 7 U.S.C.M.A. 251.

⁷⁹ UCMJ, Art. 26.

⁸⁰ Par. 82b, Manual for Courts-Martial, United States, 1951, Ex. Order 10214, Feb. 8, 1951, cited MCM.

⁸¹ Par. 537, MCM, 1951.

has the right to challenge members of the court for cause and peremptorily.⁸² Compulsory process is available to the accused to obtain witnesses in his favor.⁸³ The rules of evidence closely parallel those followed in United States District Courts.⁸⁴ Evidence obtained through an illegal search and seizure or by unauthorized wiretapping is inadmissible.⁸⁵ The accused and all witnesses are fully protected by the privilege against self-incrimination.⁸⁶ The accused has the privilege of remaining silent;⁸⁷ no unfavorable inference can be drawn from his failure to take the witness stand,⁸⁸ and his silence cannot be commented upon.⁸⁹ No confession or admission which has been obtained through coercion, unlawful influence, or unlawful inducement is admissible in evidence.⁹⁰ If the accused is convicted, the court is prohibited from imposing cruel and unusual punishments.⁹¹ Having once been tried for the offense, the accused is protected against a subsequent prosecution, either by court-martial or in federal court.⁹²

If the sentence includes confinement for one year or longer, the accused has an automatic appeal from the sentence of the court-martial to a board of re-

⁸² UCMJ, Art. 41.

⁸³ UCMJ, Art. 46.

⁸⁴ UCMJ, Art. 36; pars. 136-154, MCM, 1951.

⁸⁵ Par. 152, MCM, 1951.

⁸⁶ UCMJ, Art. 31(a).

⁸⁷ Par. 148c, MCM, 1951.

⁸⁸ Par. 148e, MCM, 1951.

⁸⁹ Par. 72b, MCM, 1951.

⁹⁰ UCMJ, Art. 31(d).

⁹¹ UCMJ, Art. 55.

⁹² UCMJ, Art. 44; par. 68d, MCM, 1951.

view,⁹³ with a right to petition the United States Court of Military Appeals, a civilian three-judge court, for further review.⁹⁴ In the case of a death sentence, review by the Court of Military Appeals is mandatory. In addition, at any time within one year after approval of the sentence by the convening authority, the accused may petition the Judge Advocate General for a new trial on the ground of newly discovered evidence or fraud on the court.⁹⁵ Even a cursory look at the decisions of the appellate bodies—decisions which in eight years have filled over twenty-six volumes of the Court-Martial Reports—will show that the appellate remedies afford the accused a powerful means of enforcing his rights. Any denial of the protections given the accused under the Code will bring swift reversal on appeal.

The accused is afforded counsel at every stage. When he is first interrogated as a suspect, he is entitled to consult with counsel.⁹⁶ At the pre-trial investigation,⁹⁷ at the taking of depositions,⁹⁸ at the trial,⁹⁹ and at each appellate level¹ he is provided, without charge, with a qualified military lawyer to represent him. He also has the right to be represented by civilian counsel.² If the accused is inadequately represented, the case will be reversed.³ The entire

⁹³ UCMJ, Art. 66.

⁹⁴ UCMJ, Art. 67.

⁹⁵ UCMJ, Art. 73.

⁹⁶ *United States v. Gunnels*, 8 U.S.C.M.A. 130.

⁹⁷ *United States v. Tomaszewski*, *supra*.

⁹⁸ *United States v. Drain*, 4 U.S.C.M.A. 646.

⁹⁹ UCMJ, Art. 27.

¹ UCMJ, Art. 70.

² UCMJ, Arts. 32, 38(b), 70(d); par. 117a, MCM, 1951.

³ *United States v. McMahan*, 6 U.S.C.M.A. 709.

trial and appellate process require no expenditure of money by the accused; even the necessary copies of the record of trial are furnished free of charge.⁴

Probation, parole, and clemency procedures offer the accused an opportunity to obtain substantial reductions in the severity of his sentence. The convening authority's clemency power may be exercised by disapproving any part or all of the sentence adjudged by the court.⁵ The board of review can exercise discretion in determining how much of the sentence to approve.⁶ The Secretary of the particular military department may remit or suspend all or part of the sentence.⁷ Annual clemency reviews throughout the term of confinement may result in successive reductions in the sentence.⁸ If the accused is placed on probation under a suspended sentence, the suspension can be vacated only after a hearing at which the accused is entitled to be represented by counsel.⁹ If a prisoner is granted parole, he comes under the supervision of a federal probation officer.¹⁰ The extent of the clemency and parole system is attested by recent statistics showing that the median length of time actually spent in

⁴ Pars. 82g, 91a, MCM, 1951.

⁵ UCMJ, Art. 64; par. 88b, MCM, 1951.

⁶ UCMJ, Art. 66(c); *United States v. Lanford*, 6 U.S.C.M.A. 371.

⁷ UCMJ, Art. 74.

⁸ Par. 5, Army Regulations 633-10, 22 January 1958; Air Force Manual 125-2, Sept. 1956, p. 102; Sec NAV Instruction 5810.6C, 4 Mar. 1958.

⁹ UCMJ, Art. 72.

¹⁰ Army Regulations 633-20; Air Force Regulations 125-23, 19 June 1956.

confinement by Army and Air Force prisoners in disciplinary barracks and federal institutions is only 57% of the length of the original sentences.¹¹

The problem of "command influence" perhaps deserves special attention. The drafters of the Uniform Code were particularly aware of the need for assuring that the personnel of courts-martial be completely free from improper command influence in the discharge of their judicial duties. Article 37 of the Code contains a prohibition against unauthorized interference with the functioning of the judicial process, and Article 98 imposes criminal penalties upon anyone who violates that prohibition. The Court of Military Appeals has made it unmistakably clear that command control, in any form whatsoever, will not be tolerated.¹² Court-martial personnel must be completely free to perform their duties honestly and impartially. However compelling the evidence of guilt may be, the presence of command control will bring automatic reversal of the case.¹³ The accused can raise the issue of command control at any point, and in support of his claim he may present on appeal new evidence which was not introduced below.¹⁴ As the Court of Military Appeals has stated, "any circumstance which gives even the appearance of improperly influencing the court-martial proceedings against the accused must be condemned".¹⁵

¹¹ Army and Air Force Prisoners, Semi-Annual Statistical Report, 1 January - 30 June 1958, p. 26.

¹² *United States v. Hawthorne*, 7 U.S.C.M.A. 293.

¹³ *United States v. Berry*, 1 U.S.C.M.A. 235.

¹⁴ *United States v. Ferguson*, 5 U.S.C.M.A. 68.

¹⁵ *United States v. Hawthorne*, *supra*, at 297.

It may be urged, however, that although at the present time the accused is afforded all the foregoing safeguards, Congress may withdraw them at any time it chooses and substitute a less fair or protective system. To that argument, there are three answers. In the first place, Congress is not free to ignore constitutional limitations applicable to trial by court-martial.¹⁶ Secondly, Congress is hardly likely to turn back the course of development which has increasingly improved the system of military justice. Thirdly, court-martial jurisdiction over civilians could be re-examined should statutory changes remove existing safeguards. At issue here are the cases of four persons who have been tried under the present Uniform Code of Military Justice, not under some hypothetical system which Congress might possibly enact in the future.

To assume that evils which once existed continue to exist under the Code would be quite incorrect. The Code establishes a modern system of criminal law, rigorously protecting the rights of the accused. Errors and abuses may occur in any law-enforcement system. The decisions of this Court reveal instances of flagrant violation of statutory and constitutional rights by legislative, executive, and judicial agencies of the states and the Federal Government; but just as this Court and other federal and state courts stand ready to strike down abuses when they occur, the Court of Military Appeals and other military tribunals, as well as the federal courts, stand ready to preserve the honest and impartial operation of military justice.

¹⁶ *Burns v. Wilson*, 346 U.S. 137

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals should be reversed.

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AUGUST 1959.

APPENDIX

United States citizen civilian employees and civilian dependents located in foreign countries as of March 31, 1959

Country	Total civilian employees	Total dependents (of military and civilian employees)	Country	Total civilian employees	Total dependents (of military and civilian employees)
Total.....	25,585	455,086	Great Britain—Continued		
Afghanistan.....		19	West Indies and British Virgin Islands.....	18	500
Argentina.....	5	107	Malta.....	7	374
Australia.....	5	94	Gibraltar.....		2
Austria.....	5	106	St. Helens (including Ascension Island).....		
Bahrein.....		19			
Belgium.....	52	303	Greece.....	104	1,595
Bolivia.....	3	58	Guatemala.....	8	102
Brazil.....	30	296	Haiti.....	4	71
Burma.....		21	Honduras.....	3	57
Cambodia.....	6	44	Hungary.....		11
Canada.....	389	11,057	Iceland.....	290	985
Ceylon.....	1	21	India.....	5	65
Chile.....	11	146	Indonesia.....		36
China.....	135	4,198	Iran.....	172	899
Colombia.....	15	192	Iraq.....	1	35
Costa Rica.....	2	69	Ireland.....		11
Cuba.....	265	3,381	Israel.....	1	31
Czechoslovakia.....	3	10	Italy.....	833	12,497
Denmark.....	54	302	Japan.....	4,649	51,576
Greenland.....	82		Bonin Islands.....	2	41
Dominican Republic.....	4	78	Okinawa and South Ryukyu Islands.....	2,230	11,935
Ecuador.....	7	126	Jordan.....		20
El Salvador.....	2	58	Korea.....	1,234	624
Ethiopia.....	10	132	Laos.....		8
Eritrea.....	16	669	Lebanon.....	2	49
Finland.....	1	59	Liberia.....		13
France.....	2,902	45,119	Libya.....	256	4,653
Germany.....	6,522	79,486	Luxembourg.....		31
Ghana.....		1	Malaya.....		20
Great Britain, United Kingdom.....	1,504	37,954	Mexico.....	14	123
Hong Kong.....	6	58	Morocco.....	641	7,504
Cyprus.....		121			
Singapore.....	4	45	Netherlands.....	51	903
Bahama Islands.....		69	Netherlands Antilles.....		2
Bermuda.....	447	5,422	New Zealand.....	1	16
			Nicaragua.....	2	61
			Norway.....	58	924

Country	Total civilian employees	Total dependents (of military and civilian employees)	Country	Total civilian employees	Total dependents (of military and civilian employees)
Pakistan.....	153	428	Switzerland.....	4	28
Panama.....	3	730	Thailand.....	18	555
Paraguay.....		54			
Peru.....	15	247	Tunisia.....		7
Philippines.....	672	13,087	Turkey.....	344	4,223
			Union of South Africa.....	1	18
Poland.....	1	16	Union of Soviet Socialist Republics.....		44
Portugal.....	28	219	United Arab Republic.....	9	120
Azores.....	195	2,315			
Rumania.....	2	6	Uruguay.....	4	90
Saudi Arabia.....	27	130	Venezuela.....	2	389
			Vietnam.....	73	249
Spain.....	862	11,901	Yugoslavia.....	3	56
Sudan.....			Location unknown.....		34,472
Sweden.....	5	88			

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 37

BRUCE WILSON, PETITIONER

v.

MAJOR GENERAL JOHN F. BOHLENDER,
COMMANDER, FITZSIMONS ARMY HOSPITAL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT¹

OPINION BELOW

The opinion of the District Court (R. 60-72) is reported at 167 F. Supp. 791.

JURISDICTION

The order of the District Court, denying the petition for a writ of habeas corpus, was entered on November 10, 1958 (R. 72). Notice of appeal to the Court of Appeals was filed on December 2, 1958, and the record was docketed in that court on December 23, 1958 (R. 73-74). The case has not been heard or decided by the Court of Appeals. Certiorari was al-

¹ On March 6, 1959, a stipulation was filed in this Court in which the parties agreed to reverse the usual briefing procedure. Accordingly, this brief for the respondent is being filed first.

lowed by this Court on February 24, 1959 (R. 75-76).
359 U.S. 906. The jurisdiction of this Court rests on
28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether a United States civilian employed by the United States Army in Berlin may validly be tried by court-martial, pursuant to Article 2(11) of the Uniform Code of Military Justice, for non-capital offenses committed abroad.

2. Whether a United States civilian employee of the Army who committed offenses in Berlin, Germany, in 1956, was amenable to trial by court-martial pursuant to Article 18 of the Uniform Code of Military Justice.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following provisions of the Constitution are involved:

Article I, Section 8. The Congress shall have Power * * *

Clause 10. To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

Clause 11. To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

Clause 12. To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

* * * * *

Clause 14. To make Rules for the Government and Regulation of the land and naval Forces;

* * * * *

Clause 18. To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

* * * * *

Amendment V. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The pertinent Articles of the Uniform Code of Military Justice, Act of May 5, 1950, c. 169, Section 1, 64 Stat. 108, 109, 114, provide as follows:²

Article 2 [50 U.S.C. 552] *Persons subject to the code.* The following persons are subject to this code:

* * * * *

(11) Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of inter-

²The Uniform Code of Military Justice was enacted into positive law in Title 10 U.S.C. and became effective as such on January 1, 1957. Petitioner's trial occurred prior to that date. Accordingly, references in this case are to Title 50.

national law, all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States and without the following territories: That part of Alaska east of longitude one hundred and seventy-two degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands;

* * * * *

Article 18 [50 U.S.C. 578] *Jurisdiction of general courts-martial.* Subject to article 17, general courts-martial shall have jurisdiction to try persons subject to this code for any offense made punishable by this code and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this code, including the penalty of death when specifically authorized by this code. General courts-martial shall also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war.

STATEMENT

Petitioner, a citizen of the United States, was employed by the Department of the Army as an auditor with the Comptroller Division of the Army, Berlin Command (R. 1). On August 21, 1956, he was tried in Berlin by a duly convened general court-martial on charges of three acts of sodomy committed with military personnel (in violation of Article 125, Uniform Code of Military Justice, 50 U.S.C. 719), of two lewd and lascivious acts with persons under 16 years of age, and of showing obscene pictures to persons under 16 years of age with the intent of arousing

their sexual desires (in violation of Article 134, Uniform Code of Military Justice, 50 U.S.C. 728) (R. 6-7).

At the trial, petitioner was represented by military as well as by independent private counsel (R. 17). After having been advised of his rights by the law officer, petitioner, in open court, pleaded guilty to the charges (R. 24). On the basis of this plea, the court-martial found petitioner guilty of all charges and specifications and sentenced him to confinement at hard labor for a period of ten years (R. 39).

The convening authority approved the findings of guilty but reduced the sentence to five years' confinement (R. 8). The Board of Review affirmed the findings of guilty and the sentence as approved by the convening authority. On review in the Court of Military Appeals, the jurisdiction of petitioner's court-martial was sustained, and the court, after considering the decision of this Court in *Reid v. Covert*, 354 U.S. 1, held Article 2(11) of the Uniform Code to be constitutional as applied to the circumstances in this case. 9 U.S.C.M.A. 60, 25 C.M.R. 322 (R. 53-60).

Ultimately, petitioner was confined in the Fitzsimons Army Hospital in Denver, Colorado, where on August 20, 1958, he filed a petition for a writ of habeas corpus in the District Court for the District of Colorado. The court held that petitioner could constitutionally be tried by courts-martial pursuant to the jurisdictional provisions of Article 2(11) (R. 60-72). An appeal was taken to the Court of Ap-

peals for the Tenth Circuit, but certiorari was allowed prior to argument or decision.

SUMMARY OF ARGUMENT

I

Petitioner was tried and convicted by court-martial of having committed certain non-capital offenses while he was in Berlin as a civilian employee of the Army. Jurisdiction over petitioner was based on Article 2(11) of the Uniform Code of Military Justice. Our first position is that this Article is a proper exercise of Congressional power to make rules for the government and regulation of the military forces, under Article I, Section 8, Clause 14 of the Constitution. The arguments which sustain the constitutionality of Article 2(11) as applied here are fully set forth in our brief in *McElroy v. Guagliardo*, No. 21, this Term, which presents the same issue.

II

There is an additional jurisdictional basis for the trial of petitioner by court-martial. He was convicted by a general court-martial of offenses committed in Berlin, Germany, which is territory occupied by the Allied forces as a consequence of World War II. Under Article 18 of the Uniform Code of Military Justice, Congress has provided that persons who by the law of war are subject to trial by military tribunals shall similarly be subject to trial by general court-martial and to punishment in accordance with the laws of war. It is clear that, by virtue of its war powers, Congress can validly provide for

such trial and punishment in territory occupied as a result of war.

There is a long history in the United States of the use of military commissions as an instrument of governmental administration of occupied territories. During hostilities and subsequent occupation periods in the Mexican War, the Civil War, the Spanish-American War, and World War II, military commissions were established under the war power, and such tribunals were uniformly upheld by the federal courts.

This Court recently upheld the validity of a trial of an American citizen by a military court in West Germany during the occupation regime. *Madsen v. Kinsella*, 343 U.S. 341. The status of Berlin as an occupied area at the present time is identical with the occupied status of West Germany at the time of the trial and conviction of Mrs. Madsen, and that case accordingly is dispositive of the question here.

ARGUMENT

I.

As applied to petitioner, a civilian employee of the Army tried overseas by court-martial for non-capital offenses, Article 2(11) of the Uniform Code of Military Justice is valid under Article I, Section 8, Clause 14 of the Constitution

Petitioner Wilson, a civilian employee of the Army, was convicted by court-martial of having committed, in Berlin, a non-capital offense against the Uniform Code of Military Justice. As applied to petitioner, the constitutional validity of Article 2(11) of the Uniform Code of Military Justice, under Article 1,

Section 8, Clause 14 of the Constitution, depends on the very same factors and considerations discussed in our brief in *McElroy v. Guagliardo*, No. 21, this Term, to which the Court is respectfully referred. The judgment of the District Court denying the petition for writ of habeas corpus should be affirmed for the reasons stated in our *Guagliardo* brief.

II.

Court-martial jurisdiction over petitioner may also be sustained under the Congressional war powers

Alternatively, court-martial jurisdiction in the present case can be sustained under Article 18 of the Uniform Code of Military Justice (*supra*, p. 4)³ on the basis of the Congressional war powers. Those powers (upon which the District Court did not rely) are relevant here because this case arose and was tried in Berlin, which remains an occupied territory the occupants of which may be tried by court-martial under the law of war and Article 18.

A. Military trials may validly be held in territory under military occupation

In *Madsen v. Kinsella*, 343 U.S. 341, the Court was confronted with the case of a civilian dependent, wife of a member of the armed forces, whom a United States Court of the Allied High Commission in Germany convicted of murdering her husband. The offense took place in October, 1949, near Frankfurt, Germany, in what was then the United States Area

³ "General courts-martial shall also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war."

of Control. After her incarceration in this country, Mrs. Madsen filed a petition for a writ of habeas corpus, challenging the jurisdiction of the court which convicted her, but this Court affirmed judgments of the lower courts which had rejected her contentions.⁴

While it was conceded by the petitioner in *Madsen* that a United States court-martial would have had jurisdiction, challenge was made to the jurisdiction of the special occupation court which tried and convicted her. In discussing the power of that tribunal, this Court laid down the ground rules for the exercise of jurisdiction in occupied territory by military courts under the war powers.⁵ The fact of occupation supplies the constitutional basis for the exercise of jurisdiction by special military courts, and, *a fortiori*, by courts-martial, over soldier and civilian alike, within the occupied territory. 343 U.S. at 348. The validity of military jurisdiction is not vitiated by the fact that there may be some form of local government, as long as it is "a government prescribed by an occupying power and * * * [dependent] upon the continu-

⁴ In 1957, after the decisions in *Reid v. Covert*, 354 U.S. 1, had been handed down, Mrs. Madsen again petitioned for a writ of habeas corpus, relying on the *Covert* decision. This attempt was not successful. *Madsen v. Overholser*, 251 F. 2d 887 (C.A.D.C.), certiorari denied, 356 U.S. 920.

⁵ With respect to the problem presented by the instant case, Congress has specifically used its war powers in the enactment of Article 18 of the Uniform Code of Military Justice, 50 U.S.C. 578 (presently 10 U.S.C. 818), *supra*, p. 4. In *Madsen*, the tribunals were established under the authority of the President. Here, Congressional war power is directly involved. These constitutional powers are discussed in *Ex parte Quirin*, 317 U.S. 1, 25-26. See also Winthrop, *Military Law and Precedents*, 831 (Reprint 1920 ed.).

ing military occupancy of the territory" (343 U.S. at 357). The authority for such military trials "does not necessarily expire upon cessation of hostilities or even, for all purposes, with a treaty of peace. It may continue long enough to permit the occupying power to discharge its responsibilities fully" (343 U.S. at 360).

In addition to the *Madsen* case, and two other recent decisions by this Court (*Ex parte Quirin*, 317 U.S. 1 (espionage); *In re Yamashita*, 327 U.S. 1 (war crimes)), which sustained the jurisdiction of military commissions as an incident of war and occupation in World War II, this Court has on other occasions upheld the jurisdiction of tribunals established by the United States under the customs and usages of the laws of war. *Leitensdorfer v. Webb*, 20 How. 176, sustained the civil jurisdiction of occupation courts set up by General Kearney in New Mexico after the Mexican War. The attack there was upon the validity of certain ordinances of the military government which provided for occupation courts with criminal and civil jurisdiction. The Court stated (20 How. at 178):

Of the validity of these ordinances of the provisional Government there is made no question with respect to the period during which the territory was held by the United States as occupying conqueror. * * * But it has been contended, that whatever may have been the rights of the occupying conqueror *as such*, these were all terminated by the termination of the belligerent attitude of the parties. * * * The fallacy of this pretension is exposed by

the fact, that the territory never was relinquished by the conqueror, * * *.

During the same period, General Scott convened military commissions for the purpose of trying offenses committed during the occupation of Mexico which were non-military in nature, "whether committed by Mexicans or other civilians in Mexico against individuals of the U.S. military forces, or by such individuals against other such individuals or against Mexicans or civilians * * *." Winthrop, *Military Law and Precedents*, 832 (Reprint 1920 ed.); Birkhimer, *Military Government and Martial Law* (3d ed., 1914), App. I, pp. 581-582 (full text of General Order No. 287 establishing the military commissions).

Military commissions were likewise used extensively during the Civil War, some having been convened as early as 1861. Winthrop, 833. This Court specifically upheld the jurisdiction of provisional courts set up by President Lincoln in Louisiana after that territory had been occupied by the Union armies. *The Grapeshot*, 9 Wall. 129, 131; see also *Burke v. Miltenberger*, 19 Wall. 519; 524; *United States v. Reiter*, 27 Fed. Cas. No. 16146 (Prov. Ct. La.). Similarly, a court established by an army department commander in New Orleans was held to be validly constituted, in *Mechanics' Bank v. Union Bank*, 22 Wall. 276, 296. The Spanish-American War offers additional precedents as to the use of tribunals constituted as an incident of military occupation. See *Neely v. Henkel* (No. 1), 180 U.S. 109, 121-123; *Santiago v. Nogueras*, 214 U.S. 260, 266; *Ex parte Ortiz*, 100 Fed. 955, 963 (C.C. Minn.).

What these decisions show is that military jurisdiction in occupied territory is one facet of the assumption of governmental powers by the occupying power. The occupation government which creates the conditions for military jurisdiction may be military, or, as it was in Germany when the *Madsen* crime took place, civilian. When such a government is established, it constitutes the supreme authority in the occupied territory (Winthrop, 800):

Military government, thus founded [on the fact of occupation], is an exercise of sovereignty, and as such dominates the country which is its theatre in all the branches of administration. Whether administered by officers of the army of the belligerent, or by civilians left in office or appointed by him for the purpose, it is the government of and for all the inhabitants, native or foreign, wholly superseding the local law and civil authority except in so far as the same may be permitted by him to subsist. * * * The local laws and ordinances may be left in force, and in general should be, subject however to their being in whole or in part suspended and others substituted in their stead—in the discretion of the governing authority.*

* Military government, the status involved in this case, should be distinguished from martial law. In general, military government involves military control of foreign territories as a consequence of war, whereas martial law concerns itself with the military control of domestic territories in which because of some dire necessity, such as an impending insurrection or rebellion, extraordinary measures need to be employed. As indicated above, military government depends only upon the fact of occupation. See Wiener, *A Practical Manual of Martial*

Local law and civil authority remain within the power and responsibility of the occupying state until that state provides a substitute or until the fact of occupation ceases to exist.

In sum, it is clear that where there is an occupation, there may be an occupation government, and, as part of such a government, there may be military courts with the power to try soldiers and civilians under the law of war.⁷ *Madsen* is but a recent,

Law 7 (1940). It should also be noted that the criminal jurisdiction of the civil courts is much less subject to be abridged under martial law than it is under military government. Winthrop, 830. See, also, *Ex parte Milligan*, 4 Wall. 2, where the Court placed great emphasis on the fact that civil courts were open. When military government is established, civil courts have no authority whatever, except insofar as they are permitted to operate by the occupying power. The military government itself assumes the judicial function or else delegates it to the courts of the occupied territory.

⁷Civil-type offenses, such as those committed by petitioner in this case, are properly triable under the laws of war. Conduct is considered to be a crime cognizable under those laws if it is either specifically punishable under the criminal laws of the occupied state or recognized generally by civilized nations as a crime against society: *United States v. Schultz*, 1 U.S.C.M.A. 512, 4 C.M.R. 104 (homicide by negligent operation of a motor vehicle); see also, *Birkhimer, op. cit.*, 581-582; and Winthrop, 773. The practice of modern warfare has recognized the right of the occupying power to set up its own military courts and to alter local criminal law and procedure (though it should, if possible, leave in force local criminal laws and rule the people of the occupied nation through their own laws and rules of administration). 2 Oppenheim, *International Law*, §§ 169, 172 (7th ed., 1952); Spaight, *War Rights on Land*, 356 (1911); Graber, *The Development of the Law of Belligerent Occupation 1863-1914*, 110 (1949). These principles were codified in Article 64 of the Geneva Convention, T.I.A.S.

though cogent, example of the use of military courts as an incident of occupation. See the opinion of Mr. Justice Black in *Reid v. Covert*, 354 U.S. 1, 35, fn. 63.

B. Berlin continues under military occupation

As we have just shown (*supra*, pp. 8-14), petitioner's trial must be held to be valid under Article 18 of the Uniform Code if Berlin was occupied territory in 1956. Our position is that the status of West Berlin, in 1956 and today, is identical with the status of West Germany as occupied territory as of the time of the events in *Madsen v. Kinsella*. Berlin is under military occupation, both technically and realistically; our right there are rights of occupation. One need only peruse the daily newspapers to become aware of the fact, the necessity, and the reasonableness of the continuation of this status of occupation. See the *Note from the United States to the Soviet Union on Berlin, December 31, 1958* (Documents on Germany, 1944-1959, Committee Print, Senate Committee on Foreign Relations, 86th Cong., 1st Sess., p. 347), which explains our position on Berlin. In the view of the United States, the three Western powers are there as "occupying powers" and are not prepared to relinquish, on the terms of the Soviet Union, the

3365. The occupying powers have uniformly tried their own nationals in their own military courts rather than permit them to be tried in the local tribunals. See, for example, Fraenkel, *Military Occupation and the Rule of Law*, 22, 150 (1944), with respect to the practice during the Rhineland occupation after World War I.

rights they acquired through the victory in World War II.⁸

1. This Court fully discussed the history of the occupied status of Germany in the *Madsen* case (decided in April 1952). Accordingly, it need not be re-examined here in detail. The important issue is whether subsequent events have in any way changed the status of Berlin since the decision in *Madsen*.

Briefly, after the defeat of the Axis powers in Europe in 1945, the Supreme Commanders of the various Allied Powers issued a declaration assuming supreme authority with respect to Germany, including "all the powers possessed by the German Government, the High Command and any state, municipal, or local government or authority." 12 Dept. of State Bull. 1051. Whatever authority Germany regained after this assumption of supreme authority depended upon the agreement and consent of the occupying powers.

⁸ The United States has consistently taken the position that the Berlin occupation status cannot be unilaterally changed by any of the four occupying powers, including the Soviet Union. This country committed itself to a specific agreement with the United Kingdom and France that the rights of the occupying powers would continue to be exercised in Berlin notwithstanding the termination of the occupation regime in West Germany. *Tripartite Agreement on the Exercise of Retained Rights in Germany*, T.I.A.S. 3427 (par. 3). For a full statement of the position of the United States on Berlin, see *The Soviet Note on Berlin: An Analysis*, State Dept. Pub. 6757 (1959). This publication explains in detail the history of the status of Berlin after World War II as well as the texts of various replies to Soviet proposals on Berlin. Without exception, this country has bottomed its right to be in Berlin on the continued existence of the occupation. See the *Statement by the Department of State on Legal Aspects of the Berlin Situation, December 20, 1958* (Documents on Germany, 1944-1959, *supra*, p. 336).

The policy of the Government of the United States has been to place Germany on an economically self-sustaining basis and to permit the German people to govern themselves. In implementation of this policy, the Western military governors approved the so-called Bonn Constitution which was to form the Basic Law of the Federal Republic of Germany. One paragraph of the letter of approval submitted by the military governors of the western zones of Germany to Chancellor Adenauer is particularly pertinent to the problem of Berlin. Two Articles of the Basic Law purported to include Berlin as a Land within the Federal Republic. Article 23 provided that the Basic Law applied to Berlin; and Article 144(2) in effect stated that if, because of some restriction the Basic Law could not apply in Berlin, that city could still send representatives to the Bundestag and the Bundesrat. The military governors suspended the effect of these two Articles as they applied to Berlin. *Germany 1947-1949, The Story in Documents*, 279, State Dept. Pub. 3556 (1950) (Letter of May 12, 1949).^a This reservation as to the exercise of sovereignty by the Federal Republic of Germany in Berlin has never been repealed or altered in any manner whatever. On the contrary, in 1952, during

^a"A third reservation concerns the participation of Greater Berlin in the Federation. We interpret the effect of Articles 23 and 144(2) of the Basic Law as constituting acceptance of our previous request that while Berlin may not be accorded voting membership in the Bundestag or Bundesrat nor be governed by the Federation she may, nevertheless, designate a small number of representatives to attend the meetings of those legislative bodies."

negotiations which culminated in the formulation of the Bonn Conventions,¹⁰ the Allied High Commissioners (who had replaced the Military Governors) in a letter to Chancellor Adenauer reiterated the reservations made earlier by the military governors as to the application of certain portions of the Basic Law of the Federal Republic. T.I.A.S. 3425, p. 1352. And the Bonn Conventions themselves contained specific reservations with respect to the rights of the three powers in Berlin (Article 2, *Convention on Relations*, T.I.A.S. 3425, p. 1484):

In view of the international situation, which has so far prevented the reunification of Germany and the conclusion of a peace settlement, the Three Powers retain the rights and the responsibilities, heretofore exercised or held by them, relating to Berlin and to Germany as a

¹⁰ The Bonn Conventions were ultimately adopted with certain amendments by the so-called Paris Protocol and became effective on May 5, 1955. *Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany*, T.I.A.S. 3425. The specific Conventions, as amended (*Convention on Relations between the Three Powers and the Federal Republic of Germany; Convention on the Rights and Obligations of Foreign Forces and their Members in the Federal Republic of Germany; Finance Convention; Convention on the Settlement of Matters Arising out of the War and the Occupation; Agreement on the Tax Treatment of the Forces and their Members*) are found in composite form in T.I.A.S. 3425, pp. 1483-1571. As submitted to the United States Senate these Conventions are found in S. Doc. 11, 84th Cong., 1st Sess. The coming into effect of these agreements ended the military occupation of West Germany, and the Federal Republic emerged as an independent sovereign state, subject only to the exercise of the rights of the three powers with respect to Berlin and to Germany as a whole. See above, p. 17 ff.

whole, including the reunification of Germany and a peace settlement. * * *

When Secretary of State Dulles forwarded the various agreements to the President for submission to the Senate for approval he specifically stated that the arrangements for the termination of the occupation regime in the Federal Republic did not affect the status of Berlin. 31 Dept. of State Bull. 852.

The German Federal Constitutional Court itself asserts that the Federal Republic exercises no direct sovereign powers in West Berlin. In a recent case a Berlin court submitted to the Federal Constitutional Court a question concerning the constitutionality of a West Berlin statute. The Constitutional Court held that it had no jurisdiction to rule on the question, because the reservation of the three powers which prevented the application of the Basic Law in Berlin also prevented the Constitutional Court from taking jurisdiction over questions arising in Berlin.¹¹ The court so held even though the Berlin legislature purported to adopt a statute of the Federal Republic which had conferred jurisdiction on the Constitutional Court. It noted that the Allied Kommandatura in Berlin had protested the adoption of the statute because it violated the policy of the three powers. The court concluded that the reservation precluded its

¹¹ The court did not follow the view of the Allied High Commission that Berlin was not a Land of the Federal Republic. However, it held that the Basic Law of the Federal Republic was effective in Berlin only insofar as it was not restricted by reservations of the three powers.

exercise of jurisdiction in Berlin.¹² 10 *Neue Juristische Wochenschrift* 1273 (No. 35, 1957); 52 *Am. Jour. Int'l Law* 358-360.

The United States has maintained its policy of separate treatment of Berlin throughout the post-war period. Although the three Western powers were hopeful that the policies established for the Federal Republic could be extended to Berlin in order to insure its economic growth, outright inclusion of Berlin within the Federal Republic has not been deemed feasible. West Berlin, its status, and our control, have been unaffected by our agreements with the Federal Republic of Germany.

2. The situation with respect to the local government of Berlin did not develop as did that of the Federal Republic. Although as far as possible the Allied powers placed the local government into the hands of the people of Berlin, the status of the city as an occupied territory remains unchanged. The Allied Kommandatura, the agency which administers and has administered Berlin since its occupation, is the governing body of that city. This body was not dissolved, as was the Allied High Commission with the emergence of the Federal Republic.¹³

¹² Other courts of the Federal Republic whose jurisdiction does not involve the right to pass on Berlin statutes have been permitted to exercise appellate jurisdiction in cases arising in the Berlin courts. *Berlin: Allied Rights and Responsibilities in the Divided City*, 6 *Int'l and Comp. L.Q.* 82, 93.

¹³ The Agreement on the Control Machinery in Germany on November 14, 1944, as amended May 1, 1945, established quadripartite governing authority for the city. The Soviet Union left the Kommandatura in 1948 and since that time the Western sectors of Berlin have been governed by the remain-

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1959

No. 21

NEIL H. McELROY, SECRETARY OF DEFENSE, ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA, EX REL. DOMINIC
GUAGLIARDO

On Writ of Certiorari to the United States Court of
Appeals for the District of Columbia Circuit

BRIEF FOR THE RESPONDENT

STATUTES INVOLVED

The provision of the Uniform Code of Military Justice, as codified in 70A Stat. 37, 10 U.S.C. § 802, provides:

§ 802. Art. 2. Persons subject to this chapter

The following persons are subject to this chapter:

(1) Members of a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment; volunteers from the time of their muster or acceptance into the armed forces; inductees from the time of their actual induction into the armed forces; and other persons lawfully called or ordered into, or to duty in or for training in, the armed forces, from the dates when they are required by the terms of the call or order to obey it.

(2) Cadets, aviation cadets, and midshipmen.

(3) Members of a reserve component while they are on inactive duty training authorized by written orders which are voluntarily accepted by them and which specify that they are subject to this chapter.

(4) Retired members of a regular component of the armed forces who are entitled to pay.

(5) Retired members of a reserve component who are receiving hospitalization from an armed force.

(6) Members of the Fleet Reserve and Fleet Marine Corps Reserve.

(7) Persons in custody of the armed forces serving a sentence imposed by a court-martial.

(8) Members of the Coast and Geodetic Survey, Public Health Service, and other organizations, when assigned to and serving with the armed forces.

(9) Prisoners of war in custody of the armed forces.

(10) In time of war, persons serving with or accompanying an armed force in the field.

(11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States and outside the following: that part of Alaska east of longitude 172 degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands.

(12) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States and outside the following: that part of Alaska east of longitude 172 degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands. Aug. 10, 1956, c. 1041, 70A Stat. 37.

SUMMARY OF ARGUMENT

I.

In *Reid v. Covert*, 354 U.S. 1, this Court held Subparagraph 11 of Article 2 of the Uniform Code of Military Justice, 10 U.S.C. §802(11), to be unconstitutional insofar as it authorized peacetime court martial jurisdiction over civilian dependents when charged with a capital offense. Having held Subparagraph 11 to be unconstitutional in part, it is unnecessary for this Court to consider the constitutionality of the remaining portion of the subparagraph because under well established principles of statutory construction, the two portions are not severable. Subparagraph 11 is plain and unambiguous. There is no room for construction except as to the constitutionality. Under the doctrine of *United States v. Reese*, 92 U.S. 214, 221, separation cannot be made because it would involve inserting words of limitation where there are none and involve legislation by the judiciary.

Further, it is not possible to say whether Congress would want the subparagraph severed or how it should be accomplished. The decision in *Reid v. Covert* removed 95% of those persons made subject to the Code by Subparagraph 11, when charged with the most serious offenses. It would seem that Congress would have sought another remedy than the one provided in Subparagraph 11, in view of the unconstitutional portion. This view is fortified by the obvious Congressional purpose to treat all civilians uniformly which objective could not be fulfilled by making the subparagraph separable. The policy considerations involved in validly redrafting Subparagraph 11 further indicate the wisdom of this Court's refraining from the attempt to redraft Subparagraph 11.

II.

The power of Congress in Article I, Section 8, Clause 14 to make rules for the government and regulation of the

land and naval forces does not authorize peacetime court martial of civilian employees. No support for the asserted jurisdiction is found in the Constitutional Convention. Indeed, when the strong anti-militarist feeling of the Convention is considered, the absence of any comment on Clause 14 indicates that the Founding Fathers did not intend by Clause 14 to authorize peacetime court martial of civilians. Throughout the 19th century, it was uniformly held by Attorneys General, Judge Advocates General, and recognized textwriters that civilians were not subject to court martial in time of peace. These rulings were made in published official reports. The episodic evidence to the contrary advanced by petitioners indicates the weakness of attempting to find historical support for their position.

Further, the principles enunciated by this Court in other cases involving extension of military jurisdiction at the expense of trial by jury are persuasive that peacetime court martial power over civilians is unconstitutional. Whenever an attempt has been made to enlarge military jurisdiction at the expense of trial by jury, that attempt has failed. *Ex Parte Milligan*, 4 Wall. 2; *Duncan v. Kahanamoku*, 327 U.S. 304; *Toth v. Quarles*, 350 U.S. 11; *Reid v. Covert*, 354 U.S. 1.

III.

Respondent's "connection with" the armed forces is not such that he should thereby be made subject to court martial jurisdiction in time of peace. Although employed by the armed forces, respondent remained a civilian. He lived as a civilian. His employment was as a civilian. He was free to quit at any time. Respondent's status should be contrasted with an airman. An airman enlisted and was bound to serve the term of his enlistment. On enlisting, he swore to obey the orders of the President and orders of officers appointed over him.

The most important distinction between a civilian employee of the Air Force and an airman is that the airman

is continually under restraint by his Commanding Officer. He cannot come and go as he pleases, cannot quit, and must obey the orders given him. A civilian employee is free to come and go as he chooses, may quit, and can only be given orders about his work. An airman overseas with the Air Force is there primarily to fight and to prepare to fight. Respondent was in Morocco simply to work at his trade.

Respondent's relation to the Air Force is transient, part time, and terminable at any time by either party. He is no more a "part" of the Air Force than any secretary in the Pentagon and his relation to the Air Force does not justify its having peacetime court martial jurisdiction over him.

IV.

Peacetime court martial jurisdiction over civilian employees is not "necessary and proper" for the "regulation and government of the land and naval forces". The asserted power is not "proper" because it conflicts with specific guarantees in the Bill of Rights—trial by jury after indictment by a grand jury. Although the enumerated powers are often expanded by virtue of the necessary and proper clause, no prior decision of this Court has ever expanded an enumerated power at the expense of a specific guarantee in the Bill of Rights.

In any event, the asserted power of court martial of civilian employees in time of peace is not necessary to the function of the armed forces abroad. This is indicated by the reasons given by various military commanders for the necessity of court martial power. The most pressing reasons given (and those involving the most numerous cases) are to prevent black market operations and to prevent traffic violations. These are obviously functions of the host country and violations of the host country's laws. Clearly they do not justify peacetime court martial jurisdiction over civilians. Other reasons, such as, prevention of disclosure of classified information, are not persuasive. The

offense is rare and is already a violation of the Criminal Code, 18 U.S.C. §§ 792-797, and could be prosecuted in the United States even though committed abroad, Cf. 18 U.S.C. § 791.

In addition to United States citizens employed abroad by the Defense Department, there are over 200,000 other persons who work for the armed forces abroad. These foreign nationals have jobs which are in many cases identical to those of United States citizens. All have access to the overseas bases and are as much a "part" of our armed forces abroad as is respondent. Yet there is no court martial power over these civilians and none has ever been sought.

Further, there are some 60,000 American citizens employed abroad by other departments of the United States Government. These departments are able to carry out their programs without the power of court martial. When these Americans commit a crime, they, like other Americans employed or traveling abroad, are subject to trial in the foreign country's courts. No valid reason has been advanced for differentiating between United States citizens employed by the Defense Department abroad and these other employees and other Americans abroad. It would be more consonant with our tradition to have civilians tried by civilian courts, even though foreign civilian courts, than to subject some American civilians to trial by military courts martial in time of peace.

Even if necessity could authorize the peacetime expansion of court martial power to encompass civilians, petitioners' reasons fall far short of establishing the requisite necessity.

ARGUMENT

I. THE PORTION OF SUBPARAGRAPH 11 OF ARTICLE 2 OF THE UNIFORM CODE OF MILITARY JUSTICE WHICH WAS DECLARED UNCONSTITUTIONAL IN *REID v. COVERT* IS NOT SEPARABLE FROM THE REMAINDER OF THE SUBPARAGRAPH.

A. The Provision Is Plain, Unambiguous and Leaves No Room for Construction, Except as to the Effect of the Constitution.

Article 2 of the Uniform Code of Military Justice, 10 U.S.C. § 802, enumerates in 12 subparagraphs the various classifications of persons subject to the Code (*supra*, pg. 1). Subparagraph 11, under which respondent was prosecuted, makes subject to the Code:

“... persons serving with, employed by, or accompanying the armed forces outside the United States ...”.

In *Reid v. Covert*, 354 U.S. 1, this Court held Subparagraph 11 to be unconstitutional at least insofar as it applied to a person accompanying the armed forces charged with a capital offense. That case, and its companion, *Kinsella v. Krueger*, involved a civilian dependent charged with murdering her husband, a member of the Armed Forces. One case occurred in Japan, the other in Germany. This Court held that both courts martial were unconstitutional. The principal opinion by Mr. Justice Black was concurred in by the Chief Justice, Mr. Justice Douglas and Mr. Justice Brennan. Mr. Justice Black, while recognizing “that there might be circumstances where a person could be ‘in’ the armed forces for purposes of Clause 14 even though he had not formally been inducted into the military or did not wear a uniform” (354 U.S. at 22-23), stated that:

“We agree with Colonel Winthrop, an expert on military jurisdiction, who declared: ‘A statute cannot be

framed by which a civilian can lawfully be made amenable to the military jurisdiction in time of peace."

354 U.S. at 35

(Emphasis not supplied)

Mr. Justice Frankfurter and Mr. Justice Harlan, in their concurring opinions, agreed that the peacetime court martial of dependents charged with capital offenses was unconstitutional, but limited their decision to that factual situation.

Having held Subparagraph 11 to be unconstitutional in part, it is unnecessary for this Court to consider the constitutionality of the remaining portion of Subparagraph 11 because, under well established principles of statutory construction, the remaining portions of Subparagraph 11 cannot be separated from the already declared unconstitutional portion.

Subparagraph 11 is not severable because it is a plain and unambiguous single penal section, general in application. To introduce a limitation requires legislation from which courts are barred under the separation of powers doctrine. Severance would also probably be contrary to the Congressional intent.

The constitutional inquiry in the instant case is made unnecessary by the rule of construction applied in *United States v. Reese*, 92 U.S. 214, 221 and other decisions.¹ In that case, this Court was:

"directly called upon to decide whether a penal statute enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. For this

¹ *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 522; *Butts v. Merchants & M. Trans. Co.*, 230 U.S. 126, 133; *Illinois C.R. Co. v. McKendree*, 203 U.S. 514, 529; *James v. Bowman*, 192 U.S. 127, 140; *Baldwin v. Franks*, 120 U.S. 678, 686; *Virginia Coupon Cases*, 114 U.S. 270, 305; *United States v. Harris*, 106 U.S. 629, 642; *The Trademark Cases*, 100 U.S. 82, 99.

purpose, we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not there now. Each of the sections must stand as whole or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question then to be determined is whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only. It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would to some extent, substitute the judicial for the legislative department of the government." 92 U.S. at 221.

The rule of the *Reese* case is fully applicable to the case at bar. Subparagraph 11 cannot be made severable merely by striking out or disregarding words. To sever the already declared unconstitutional portion from the remainder of Subparagraph 11 requires inserting words of limitation where there are now none in the provision. It will require inserting after the word "accompanying" the words "except in capital offenses". It cannot be denied that Subparagraph 11 is plain and unambiguous in its meaning. There is no room for construction except as to the effect of the Constitution. Thus the rule of the *Reese* case forbids such construction because to do so would be to violate the separation of powers and require this Court to legislate.

B. There Is No Solid Evidence That Congress Intended the Provision to Be Separable and No Indication of How the Separation Should Be Accomplished.

When the Uniform Code of Military Justice was enacted, it contained the following separability clause:

"If any article or part thereof, as set out in section 1 of this Act shall be held invalid, the remainder shall not be affected thereby." *Act of May 5, 1950, c. 169, Sec. 2.*

Senate Report 486 (81st Cong., 2nd Sess.), which accompanied the legislation, states that the foregoing:

"is a savings provision which will preserve the validity of all the remaining articles of this act in the event any article or part thereof should be declared invalid." *1950 Cong. Code Serv., p. 2261.*

In 1956, Congress codified Title 10, including therein the Uniform Code of Military Justice. The separability clause which petitioners quote (Pet. Br. p. 22) is from the 1956 codification. However, Section 49 of the enabling act states that:

"it is the legislative purpose to restate, without substantive change, the law replaced by those sections [1-48] on the effective date of this Act." *Act of Aug. 10, 1956, c. 1041, Sec. 49.*

Hence it would seem that the separability clause to be considered is that contained in the 1950 Act, quoted above.

The separability provision does not alter essentially the problem. By enacting a separability provision, Congress:

"did not intend the court to dissect an unconstitutional measure and reframe a valid one out of it by inserting limitations it does not contain. This is legislative work beyond the power and function of the court." *Hill v. Wallace, 259 U.S. 44, 70.*

The separability clause merely creates a presumption that the legislature intended the act to be divisible, in contrast to the situation without a separability provision in which the presumption is that the act must stand as an entirety. *Williams v. Standard Oil Co., 278 U.S. 235, 241-242 (1928).* The separability clause does not change the essential inquiry before this Court. As was said in *Carter v. Carter Coal Co., 298 U.S. 238, 312:*

“... Under either rule, the determination, in the end, is reached by applying the same test—namely, What was the intent of the lawmakers?”

Before discussing the intent of Congress, it is well to note parenthetically just what is involved herein. This Court is not being asked to declare the Uniform Code of Military Justice unconstitutional. What is involved is merely one subparagraph of one section of a code comprising 140 various articles. The subparagraph involved is one of 12 classifications of persons subject to the Act (*supra*, p. 1). Obviously, a determination by this Court that subparagraph 11 is invalid because of the admittedly unconstitutional portion would not disturb the remaining 11 categories of persons subject to the Act or invalidate any of the other 139 articles of the Code. The limited nature of the issue in this regard is important because most of the other cases involving separability involve the entire statutory scheme enacted by the legislature. Cf *Williams v. Standard Oil Co.*, *supra*; *Carter v. Carter Coal Co.*, *supra*.

The separability provision was included to avoid the entire Code from being held invalid, rather than each article or subparagraph thereof. This is demonstrated by Senate Report 486, *supra*, which says the provision “will preserve the validity of all the remaining articles of this act in the event any article or part thereof should be declared invalid.”

When the Congressional intent is considered, it is apparent that the possibly valid portion of subparagraph 11 may not be separated from the admittedly invalid portion. There is no solid evidence that Congress would have so intended. Further, as Judge Fahy pointed out in the court below:

“We do not know how to sub-divide this provision as Congress might have done if Congress had known it could not be upheld as written.” (R. 41)

The majority below held that subparagraph 11:

“is nonseverable into fragments which have not been specified by Congress or as to which Congress has not

furnished criteria for a case-by-case judicial application.” (R. 41)

1. The admittedly unconstitutional portion of subparagraph 11 applies to the vast majority of what the Government characterizes as the “civilian contingent” and applies when charged with the more serious offenses. Of the 480,000 United States citizen civilian employees and civilian dependents located in foreign countries as of March 31, 1959, only 25,000 are civilian employees (Pet. Br., App. pp. 110-111). The remaining 455,000 are dependents as to whom the *Covert* case in terms applies when they are charged with a capital offense. Ninety-five per cent of those covered by subparagraph 11 are thus excluded by virtue of the decision in *Reid v. Covert*. To sever the remaining portion of subparagraph 11, it is necessary to assume that Congress would have passed the same statute even though 95% of those it intended to cover were constitutionally excluded. Merely to state the assumption is to demonstrate that it is unwarranted. Common sense tells us that had Congress known that 95% of those it sought to cover by subparagraph 11 would be constitutionally excluded (when charged with the most serious crimes), it would have sought another remedy than the one set forth in the Code.

2. In enacting the Uniform Code of Military Justice, Congress obviously intended to treat alike all civilians which it made subject thereto. This is borne out by the statute itself and confirmed by petitioner’s argument in the case at bar and in *Reid v. Covert*. This objective of uniform treatment would obviously be frustrated by severing subparagraph 11. It would seem more consonant with the Congressional objective of uniformity to hold the entire subparagraph 11 invalid. Faced with the impossibility of treating all civilians uniformly and subjecting them to general courts martial, it is more likely that Congress would have sought a different solution than subjecting some civilians to court martial while excluding others. Congress would

have to make some provision for the situation of dependents (whether by some other type of United States jurisdiction or by leaving jurisdiction where it was originally—in the foreign state) and it would seem most probable that Congress would have included civilian employees in whatever solution it decided upon for civilian dependents. In any event, the very necessity for speculating on the Congressional intent forcefully demonstrates and confirms the indivisible nature of the section as written.

3. The legislative history of the predecessor to present Article 2(11) of the Uniform Code of Military Justice makes clear that Congress was never advised and did not consider that any constitutional question was involved in extending court martial jurisdiction to civilians in time of peace.

When confronted with the constitutional problem, Congress, if it decided the power was needed, might well limit its use (1) to crimes which have an intimate relation to the function of the armed forces abroad, and/or (2) to areas in which there was not adequate civil authority to maintain law and order. The crime of sodomy (See *Wilson v. Bohlander*, O. T. 1959, No. 37), has no direct relation to the Army's function in Berlin. Similarly, the problem posed by a civilian employed by the armed forces in England is completely dissimilar to the problem raised by the commission of a crime by a civilian in an isolated island outpost in the Pacific. (See Supplemental Brief for Appellant and Petitioner, *Reid v. Covert*, Nos. 701 and 713, O.T. 1955, pp. 115-116).

The foregoing possible limitations are suggestive of policy considerations implicit in validity redrafting Subparagraph 11 so as to be constitutional. They indicate the wisdom of this Court's refraining from attempting to separate the already declared unconstitutional portion of Subparagraph 11 from the remainder.

II. THE CONGRESSIONAL POWER TO MAKE RULES FOR THE GOVERNMENT AND REGULATION OF THE LAND AND NAVAL FORCES DOES NOT AUTHORIZE THE COURT-MARTIAL OF CIVILIAN EMPLOYEES IN TIME OF PEACE.

A. At the Time of the Revolutionary War, Trial of Civilians by General Court Martial Was Restricted to "In the Field" and in Time of War.

Before advertng to the practice at the time of the Revolutionary War, it should be noted that the case at bar presents a question of Constitutional guarantees whose resolution cannot be settled by the practice at the time of the Revolution. This is because it is respondent's contention that he may not be subjected to General Court Martial in time of peace even though there would be authority to try him by General Court Martial in time of war. Thus the practice during the Revolutionary War is of little assistance in determining what the practice was in time of peace.

The pertinent provision of the Articles of War adopted by the Continental Congress on June 30, 1775, provides:

"All suttlers and retailers to a camp, and all persons whatsoever serving with the Continental Army in the field, though not enlisted soldiers, are to be subject to the Articles, Rules, and Regulations of the Continental Army." (*Journals of the Continental Congress*, Vol. 2, 1775, pg. 116.)

An almost identical provision is found in Sec. 13, Article 23, of the Articles of War adopted by the Continental Congress on September 20, 1776 (*id.* Vol. 5, 1776, pg. 800).

Although the foregoing provision may appear to be quite broad, it and subsequent reenactments have been uniformly interpreted to apply only in time of war in the field. They have been held to be inapplicable in time of war not in the field and wholly inapplicable in time of peace anywhere. See, for the views of the Attorney General to this effect, 14 Ops. Atty. Gen. 22; 16 Ops. Atty. Gen. 13 and 48; for those of the Judge Advocate General of the Army, Dig. Op. JAG

(1912), pp. 151-152, ¶¶LXII A to LXIII D; id. (1901), pp. 56-58, 563; ¶¶161-168; id. (1895), pp. 75-77, ¶¶1-8, 323, 326, 599, 600; id. (1880), pp. 48-49, 211, 384, ¶¶1-8; and for those of recognized text-writers, Winthrop, *Military Law and Precedents*, (2d Ed, Reprint 1920) pp. 97-102; Davis, *Military Law* (3d Ed., 1915), pp. 52-53, 478-479; Dudley, *Military Law and the Procedures of Courts-Martial* (2d Ed. 1908), pp. 413-414.

B. Absence of Any Mention of Court Martial Power over Civilians Coupled with the Strong Anti-Militarist Feeling at the Constitutional Convention Impels the Conclusion that the Founding Fathers Did Not Intend the Constitution to Permit Court Martial of Civilians in Time of Peace.

The authority granted Congress in Article 1, Section 8, Clause 14 "to make rules for the government of the land and naval forces" was not discussed during the Constitutional Convention. The clause was included in the final draft of the Constitution without either discussion or debate. Neither the original draft presented to the Convention nor the draft submitted by the "Committee on Detail" contained the clause. 5 Elliot's Debates, 130, 379.

The language of Clause 14 was taken from Article IX of the Articles of Confederation which gave Congress "the sole and exclusive right and power" of "making rules for the government and regulation of the said land and naval forces, and directing their operations". Under the Articles, the Army consisted of the militia called into the service, and a large measure of control over the militia rested in the States. It would appear that the reason for Clause 14 being in the Constitution was not to make any specific grant of powers (which power would seem to be incidental to the powers in Clauses 12 and 13 "to raise and support armies" and "to provide and maintain a Navy") but rather to show that Congress had the power, not the President in his function as Commander in Chief.

If the power authorized by Clause 14 were intended to include the sweeping power of trying civilians by General Court Martial in time of peace, it is inconceivable that some member of the Constitutional Convention would not have raised the point in debate. It must be remembered that distrust and hatred of military rule was one of the hallmarks of our Revolution. One of the complaints lodged against George II in the Declaration of Independence was that "He has affected to render the Military independent of and superior to the Civil Power".

In the Constitutional Convention, Gerry attempted to limit the standing army to two or three thousand men. Warren, *The Making of the Constitution*, 482-484. A number of States proposed declarations of rights asserting that standing armies in time of peace were dangerous to liberty (1 *Elliot's Debates*, 355; 3 *id.* 660; 4 *id.* 244). The history related by Justice Black in *Reid v. Covert*, at 354 U.S. 28-30, led him to conclude that:

"...the Founders had no intention to permit the trial of civilians in military courts, where they would be denied jury trials and other constitutional protections, merely by giving Congress the power to make rules which were 'necessary and proper' for the regulation of the 'land and naval Forces'."

(*Id.*, 30)

It is inconceivable that a Constitutional Convention that was very reluctant to authorize even a standing army in time of peace would grant without comment authority to try civilians by court martial in time of peace.

C. The Published, Consistent Rulings of the Judge Advocates General and the Absence of Usage after the Revolutionary War Are Further Indication of the Military's Lack of Power to Try Civilians in Time of Peace.

During the 19th century, the authority to subject civilians to military courts martial was rigorously restricted to time of war, and even during time of war, in the area of the

conflict. It is a tribute to the American military that during this period they never sought to enlarge the area of military jurisdiction.

The leading authority on military law is Colonel Winthrop, who has been described as the "Blackstone of American military law." His famous treatise "Military Law and Precedents" (2d Ed. 1896) was reprinted in 1920 by the Army for use of Judge Advocate General officers. One section of his treatise is entitled "General Principle of Non-Amenability of Civilians to the Military Jurisdiction in Time of Peace." Therein he wrote:

"That a civilian, entitled as he is, by Art. VI of the Amendments to the Constitution, to trial by jury, cannot legally be made liable to the military law and jurisdiction, in time of peace, is a fundamental principle of our public law";

and, after a lengthy discussion of the "Constitutionality of the Statutes" to the contrary, notably AW 60 of 1874, he concluded with the italicized observation (Reprint, p. 107) that:

"a statute cannot be framed by which a civilian can lawfully be made amenable to the military jurisdiction in time of peace."

Other military writers of the period, such as Gen. Davis, a former Judge Advocate General, and Col. Dudley, Professor of Law at West Point, expressed views identical to Col. Winthrop. Davis, *A Treatise on the Military Law of the United States* (3rd ed. 1915) 52-53, 478-479; Dudley, *Military Law and the Procedure of Courts-Martial* (2d ed, 1908) 413-414.

The printed opinions of the Judge Advocates General of the Army reflect the same view as seen from the following paragraphs contained in the 1912 *Digest of Opinions of the Judge Advocates General of the Army*:

"VIII G 2 a. (p. 513) By the sixth amendment of the Constitution, civilians are guaranteed the right of trial by jury 'in all criminal prosecutions'. Thus—in

time of peace—a court-martial can not assume jurisdiction of an offense committed by a civilian without a violation of the Constitution. It is only under the exceptional circumstances of a time of war that civilians may, in certain situations, become amenable to trial by court-martial.” (Citing rulings from 1866, 1867 and 1905)

“VIII G 2 a(1). (p. 513) *Held* that any statute which attempts to give jurisdiction over civilians, in time of peace, to military courts is unconstitutional.” (citing rulings from 1879, 1905 and 1906)

“LXIII B. (p. 151) The jurisdiction authorized by this article (AW 63 of 1874) can not be extended to civilians employed in connection with the Army in time of peace (citing 16 Op. Att’y Gen. 13 and 48), nor to civilians employed in such connection during the period of an Indian war, but not on the theater of such war.” (citing a ruling from 1877, with related rulings from 1877, 1903 and 1909)

Not only were the boundaries of military jurisdiction limited to time of war and in the field, but the rulings of the Judge Advocates General of the Army reflect a zealous regard to stay within these boundaries. For example, during the many undeclared Indian Wars of the last half of the 19th century, it was ruled that court martial jurisdiction could not be extended “to civilians employed in such connection during the period of an Indian war, but not on the theater of such war.” (Dig. Op. J.A.G., 1912, p. 151; ¶LXIII B; id., 1901, p. 57; ¶165, id., 1895, p. 76, ¶5; id., 1880, pg. 49, ¶5). And it was likewise ruled, in 1877 and again in 1903 and 1909, that:

“In view of the limited theater of Indian wars, this exceptional jurisdiction is to be extended on civilians, on account of offenses committed during such wars, with even greater caution than in a general war.”

(Dig. Op. J.A.G., 1912, p. 151, LXIII B; id., 1901, p. 57, ¶165; id., 1895, p. 76, ¶5; id., 1880, p. 49, ¶5), *Accord*, Winthrop, *supra* (reprint), p. 101.

This limited jurisdiction over civilians was held not to

survive the end of a war, whether general or against the Indians.

“The jurisdiction, to be lawfully exercised, must be exercised *during* the status belli.”

Dig. Op. J.A.G., 1912, p. 151, ¶LXIII B 1; id., 1901, p. 57, ¶166; id., 1895, p. 76, ¶6; id., 1880, p. 49, ¶6; Winthrop, *supra* (reprint), p. 102.

A close historical analogy to respondent is found in the Post Trader of the 19th century. The Post Trader was the successor to the sutler and was succeeded near the end of the 19th century by the Post Canteen and Post Exchange. The statutes authorizing Post Traders (Joint Resolution of March 30, 1867, No. 33, 15 Stat. 29, and Sec. 22 of the Act of July 15, 1870 c. 294, 16 Stat. 315, 319-320 (later R.S. § 1112)), provided “That such traders shall be under protection and military control as camp followers.” Sec. 3 of the Act of July 24, 1876, c. 226, 19 Stat. 97, 100, provided that every Post Trader “shall be subject in all respects to the rules and regulations for the government of the Army.” It will be seen that these provisions are almost identical with the Articles of War at the time of the Revolution. Despite the broad language in the foregoing, the Judge Advocates General of the Army held that military jurisdiction over Post Traders was limited to time of war (Dig. Op. J.A.G., 1901, p. 563, ¶2023; id., 1895, pp. 599-600, ¶4; id., 1880, p. 384, ¶4):

“A post trader is not, under the Act of 1876, and was not under that of 1867 or 1870, amenable to the jurisdiction of a military court in time of peace. The earlier statutes assimilated him to a camp-follower, but, strictly and properly, there can be no such thing as a camp follower in time of peace, and the only military jurisdiction to which a camp follower may become subject is that indicated by the 63rd Article of War, viz. one exercisable only ‘in the field’ or on the theatre of war. Nor can the Act of 1876, in providing that post traders shall be ‘subject to the rules and regulations for the government of the army’, render them amenable to trial by

court martial in time of peace. * * * If * * * the Articles of War are intended to be included, the amenability imposed, is simply that fixed by the particular Article applicable to civilians employed in connection with the Army, viz. Art. 63, which attaches this amenability only in time of war and in the field. Thus, though post traders might perhaps become liable to trial by court martial if employed on the theatre of an Indian war, as persons serving with an Army in the field in the sense of that Article, they cannot be made liable when not thus situated * * *."

D. The Historical Practice Urged by Petitioners Consists of Cases Involving the War Powers or Unpublished Material Which Is at Variance with the Published Views of the Responsible Government Officers.

Petitioners contend that the Congressional power to provide court martial jurisdiction over non-uniformed or "civilian" persons has been tested and upheld in the Federal courts (Pet. Br. 61). They contend that these decisions demonstrate that under certain circumstances at least civilian employees of the armed forces can be included within the term "land and naval forces" of Article I, Sec. 8, Clause 14. The cases do not support the contention.

First, nearly all the cases cited by the Government involve wartime situations upholding jurisdiction to court martial under the war powers clause not under clause 14.

Second, the Government urges that the cases holding that civilian paymaster clerks were in military service for court martial purposes but neglects to mention the vital difference between a paymaster clerk and an ordinary employee in the Defense Department such as respondent.

In *Ex parte Reed*, 100 U.S. 13, this Court said:

"The place of paymaster's clerk is an important one in the machinery of the navy. Their appointment must be approved by the commander of the ship. Their acceptance and agreement to submit to the laws and regulations for the government and discipline of the navy must be in writing, and filed in the department.

They must take an oath and bind themselves to serve until discharged. The discharge must be by the appointing power, and approved in the same manner as the appointment. They are required to wear the uniform of the service; they have a fixed rank; they are upon the pay-roll, and are paid accordingly. They may also be entitled to a pension and to bounty land. . . .

If these officers are not in the naval service, it may well be asked, who are."

The contrast between the paymaster's clerk and respondent is strikingly apparent. Respondent was employed by the civilian personnel office of the Nouasseur Air Base, not by the Commanding Officer. He took the same oath as is required of all Civil Service employees. He made no commitment which would bind him to serve until discharge. He wore no uniform. He had no rank. He was not entitled to a pension except as might be provided to all Civil Service employees. (See, *infra* p. 26 et seq.)

The expertise of the Court of Claims in this field must be conceded and it had no difficulty in holding that services of an employee of the Army was not time of service in computing longevity pay. After referring to *United States v. Hendee*, 124 U.S. 309, and the provision above quoted from *Ex parte Reed*, supra, said:

"It cannot be justly claimed that everyone who has employment under the government in immediate connection with the Army belongs to or is serving in the Army. Such persons are mere civilians and are in no sense a part of the Army any more than any other class of clerks in the classified service of the government."

Schreiner v. U.S., 43 C.Cls. 480, 483.

The weakness of petitioners' contention of an historical basis for the asserted peacetime court martial power over respondent is manifested in the sources of the supporting authorities cited (Pet. Brief, pg. 56). Petitioners rely primarily upon unpublished decisions of the Judge Advocates General and unpublished reports of court martial cases available only in the National Archives. From the display

of authority, one would imagine the subject under consideration was shrouded in the mists of antiquity about which no books had ever been written. The contrary, of course, is true. There are published digests of the opinions of the Judge Advocates General. There are well known treatises written by eminent military law scholars. (See, *supra* pp. 16-19.) Both sources make clear that in the 19th Century civilians were not court martialed in time of peace. The cases which petitioners cite (if indeed they represent court martials of civilians in time of peace) are contrary to the practice and opinions of a century of Judge Advocates General. The actual practice following the Revolutionary War was that stated in the digest of opinions of the Judge Advocates General and the textwriters, not that shown in the episodic courts martial found buried in the National Archives.

E. Decisions of This Court in Other Instances of Purported Court Martial Jurisdiction over Civilians Demonstrate the Unconstitutionality of the Statute Authorizing Respondent's Trial in Time of Peace.

The principles reflected in prior decisions of this Court reinforce the conclusion that peacetime court martial jurisdiction over respondent is unconstitutional. Whenever an attempt has been made to enlarge military jurisdiction at the expense of trial by jury as it existed in 1789, that attempt has failed. *Ex Parte Milligan*, 4 Wall. 2; *Duncan v. Kahanamoku*, 327 U.S. 304; *Toth v. Quarles*, 350 U.S. 11; *Reid v. Covert*, 354 U.S. 1.

The important teaching of *Ex Parte Milligan* is that necessity can never extend the limits of military jurisdiction so as to deprive a citizen of his constitutional right to trial by jury. It would unduly prolong this brief to quote from that opinion all that is pertinent. We note only the following statement by Mr. Justice Davis:

"The Constitution of the United States is a law for rulers and people, equally in war and in peace, and

covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence, as has been happily proved by the result of the great effort to throw off its just authority."

(4 Wall at 120-121)

Duncan v. Kahanamoku, supra, declared that the civilian petitioners could not constitutionally be tried by military courts in Hawaii during World War II. Of particular significance to the case at bar is petitioner Duncan. He was a civilian shipfitter employed in the Navy Yard in Honolulu. He was arrested, tried and convicted by the military for engaging in a brawl with two armed Marine sentries at the Navy Yard at Pearl Harbor. The other petitioner, White, was a stockbroker in Honolulu charged with embezzling stock belonging to another civilian. This Court drew no distinction between the two. It said:

"Both cases thus involve the rights of individuals charged with crime and *not connected with the armed forces* to have their guilt or innocence determined in courts of law which provide established procedural safeguards rather than by military tribunals which fail to afford many of these safeguards."

(327 U.S. at 307.) (Emphasis supplied)

In the concurring opinion of Mr. Justice Murphy is found the following:

"Both petitioners were civilians entitled to the full protection of the Bill of Rights, including the right to jury trial."

(id. at 326)

And the dissenting opinion attributes no significance to Duncan's status as a civilian employee of the Navy.

If the military could not try Duncan, a civilian employee of the Navy in Hawaii in time of war on a charge of attacking an armed sentry at the Navy Yard, it would seem to follow a fortiori that the military lacked constitutional authority to try respondent in Morocco in time of peace.

Toth v. Quarles, supra, decided that the Constitution forbade trial by court martial of a civilian ex-serviceman for an offense committed while in the service. The Court held that Clause 14, given its natural meaning:

“would seem to restrict court-martial jurisdiction to persons who are actually members or part of the armed forces.”

(350 U.S. at 15)

The following language is most pertinent to the case at bar:

“Determining the scope of the constitutional power of Congress to authorize trial by court-martial presents another instance calling for limitation to ‘the least possible power adequate to the end proposed’. We hold that Congress cannot subject civilians like Toth to trial by court-martial. They, like other civilians, are entitled to have the benefit of safeguards afforded those tried in the regular courts authorized by Article 3 of the Constitution.”

The most recent decision is *Reid v. Covert*, supra, in which this Court held that the Constitution prevented the peacetime trial by General Court Martial of a civilian dependent charged with a capital offense. The reasoning and principles enunciated in *Reid v. Covert* all lead to the conclusion that a civilian employee charged with a non-capital felony similarly may not be tried in peacetime by general court martial.

The similarity between this case and *Reid v. Covert* is illustrated by the arguments advanced by petitioners in the two cases. In large measure, the arguments and authorities advanced are the same. The factual difference between the two cases do not provide valid reasons for different results.

1. *Reid v. Covert* involved civilian dependents, whereas

the case at bar involves a civilian employee. In the Supplemental Brief for Appellant and Petitioners on Rehearing Nos. 701 and 713, O.T. 1955, the Government stated, at p. 37, in response to the Court's inquiry, 352 U.S. 902:

"For purposes of court-martial jurisdiction over civilians overseas in time of peace, no valid distinction can be drawn between civilians employed by the armed forces and civilian dependents."

The Government apparently has not significantly changed its position, because in this and the related cases (*Kinsella v. Singleton*, No. 22; *Wilson v. Bohlender*, No. 37) it offers no basis for distinguishing between the two categories. The same historical materials and the same arguments of "necessity" are advanced in both situations. Although it may be correct that civilian employees are more "necessary" to the armed forces abroad than dependents, no reason is advanced why peacetime court martial jurisdiction is more "necessary" in one case than the other. In fact, it could be argued that, possessing the power of dismissal over employees, the military has less need for peacetime court martial jurisdiction over employees than it does for dependents who are somewhat more economically independent of the military.

2. The other factual difference between this case and *Reid v. Covert* is that in the latter a death sentence was possible whereas in the case at bar, a fine² and five year sentence of imprisonment was the maximum penalty which could be given by the court martial. This is no valid distinction. Respondent was tried for an offense which in a civilian court would be a felony, and as such he was entitled to a trial by jury. The Constitutional distinction is not between capital and non-capital cases but between felonies and misdemeanors.

Similarly, in the historical materials said to support the

²There appears to be no limit to the amount of the fine which could be imposed. *Table of Maximum Punishments, MCM 1951*, p. 223.

jurisdiction, no distinction is drawn between capital and non-capital offenses. And in fact, the punishment which can be inflicted by a general court martial is sufficiently grave that there should be no distinction between the capital cases and those where substantial fines and imprisonment can be meted out.

In short, the principles of *Reid v. Covert*, like those of *Ex Parte Milligan*, *Duncan v. Kahanamoku*, and *Toth v. Quarles*, are persuasive that peacetime court martial jurisdiction over civilian employees is unconstitutional.

III. THE RELATIONSHIP OF A CIVILIAN EMPLOYEE TO THE ARMED FORCES IS NOT SUCH AS TO JUSTIFY PEACETIME COURT MARTIAL JURISDICTION OVER HIM.

Respondent was not a member of the armed forces. But petitioners contend that his "connection with" or relationship to the armed forces was such that, as a matter of constitutional law, he has a status equivalent to a member of the armed forces. The fallacy of petitioners' reasoning is clear when the vital differences between respondent's status and that of an airman are considered. Respondent went to Morocco of his own free will and accord, on private transportation with an ordinary passport (R. 12). An airman in Morocco was there because he was ordered there and arrived via Government transportation without a passport. Respondent lived in Casablanca as a civilian (R. 12); an airman lived on the base at Nouasseur. Respondent was employed by the Air Force; an airman enlisted in the Air Force.

The oath of office taken by a civilian employee (5 U.S.C. § 16) differs significantly from the oath taken by one enlisted in the armed forces (10 U.S.C. § 501). The civilian employee swears that he will "discharge the duties of the office on which I am about to enter." One enlisting in the

armed forces swears "that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to regulations and the Uniform Code of Military Justice."

Respondent was paid by the hour at a rate which was fixed in accordance with Air Force regulations (AFR 14-13), and which varied depending upon the area of the world in which he was working (5 U.S.C. § 902). An airman is paid by the month at a rate which is fixed by Congress and is uniform throughout the world (37 U.S.C. § 232). Needless to say, an airman does not receive any overtime pay. Cf. 10 U.S.C. § 9025.

If respondent decided not to come to work one day, he could be docked a day's pay. If an airman decided not to report, he was guilty of absence without leave (10 U.S.C. § 886), or possibly desertion (10 U.S.C. § 885). Respondent could at any time quit his employment with the Air Force. An airman is bound to serve the term of his enlistment. Respondent could be fired at any time by the Air Force. If, for example, the Government's need for him ceased, he had no further claim. An airman, on the other hand, could not be discharged until his enlistment expired, and in fact, under some circumstances, has certain statutory rights to reenlist (10 U.S.C. §§ 8256, 8263).

As this Court said in *United States v. Grimley*, 137 U.S. 151, 152:

"By enlistment the citizen becomes a soldier. His relations to the state and the public are changed. He acquires a new status, with correlative rights and duties; and although he may violate his contract obligations, his status as a soldier is unchanged. He cannot of his own volition throw off the garments he has once put on ..."

Respondent wore no uniform, although an airman, of course, did. Respondent worked fixed hours and outside of these working hours was free to come and go and do as he pleased. An airman, on the other hand, has his life regu-

lated 24 hours a day. He is only permitted to leave the Base with special permission, which respondent, of course, did not need.

Perhaps the most significant distinction between respondent and an airman is that the airman is continually under restraint by his Commanding Officer. An airman cannot come and go as he pleases and obviously cannot quit. In fact, his entire life is regulated by his superior officers. A civilian employee, such as respondent, is under no such compulsion. While he continues to work for the Air Force, he is only required to do his job. Beyond that, what he does is his business, not the Air Force's business.

Petitioners suggest (Pet. Br. p. 70) five factors to be considered in determining a person's "connection" with the armed forces.

The first factor is "the duties of the person." Respondent was hired as an electrician. It may be assumed that there were stationed at Nouasseur Air Depot Air Force enlisted men who performed or could have performed the same electrical work which respondent did. However, these airmen had other duties as well as their work as electricians. The airmen were trained to bear arms. They marched; they drilled; they performed "military" duties in addition to working as electricians.

Illustrative of the military status of the airman is the Code of Conduct for Members of the Armed Forces promulgated by the President as Commander in Chief (Executive Order 10631, August 18, 1955, 20 Fed. Reg. 6057, 5 U.S.C.A. p. 114). The first paragraph of the Code states:

"I am an American fighting man. I serve in the forces which guard my country and our way of life. I am prepared to give my life in their defense."

Thus, while there is some similarity between respondent and the airman, there is also great dissimilarity in their status and the duties that each performs.

The second factor is the place of performance of those

duties. It may be conceded that in some places the uniformed personnel and respondent would work together. Obviously, since respondent had no security clearance, work in classified areas would be performed solely by armed forces personnel and obviously the "military" duties of members of the Air Force would be done at a place from which respondent was excluded. In any event, the location is not a significant factor. Mr. Justice Frankfurter, in *Reid v. Covert*, supra, at p. 46-47, rejected the idea that proximity to the armed forces was a valid justification for court martial jurisdiction in that case.

The third factor is the hierarchy of command. Respondent might receive instructions from military personnel, or civilian personnel, or, more probably, both. The significant factor is not who was able to give him "orders and instructions" but to what extent he was bound by these orders. The tremendous overriding distinction between respondent and uniformed personnel was that he was at liberty to quit his employment with the Defense Department at any time. The "orders and instructions" which he validly could be given were restricted to the narrow limits of his work. Beyond that, his life was his own, not that of the Air Force. Contrariwise, the Air Force personnel are subject to orders and instructions of their superior officers in *all* respects. Unlike respondent, all of his life is regulated by his superior officers.

The fourth factor enumerated is "the military privileges to which the person may be entitled." These privileges are said to be those military facilities normally reserved for uniformed personnel. If the use of these facilities justifies peacetime court martial jurisdiction over respondent, all other employees of the United States Government abroad would have to be included within the jurisdiction. These privileges of use of the post exchange, commissary, service club, etc., are normally made available to *all* United States Government employees employed near an overseas military installation. Thus, the Post Exchange at Nouasseur Air

Depot in Morocco extends its privileges to the State Department personnel employed in Casablanca and nearby Rabat.

The final factor cited by petitioners is "the absence of local civilian status—whether the person is in any substantial relationship to the local civilian authorities, judicial or executive." It is difficult to understand a contention that respondent has no relationship to the Moroccan Government. In respondent's own case, he was turned over by the United States Air Force police to the local Police Department in Casablanca where he was placed in the jail and subsequently interrogated by the police. The policeman later testified at the court martial and it was on the basis of this testimony that respondent was convicted (See, *Verbatim Record of Trial of Dominic Guagliardo by General Court Martial* (lodged with the Clerk), testimony of Mr. Emile Veysette, Principal Inspector, Regional Service of Judiciary Police, Casablanca, Morocco, pp. 151, et seq.). A more substantial relationship to the local civilian authorities can hardly be imagined.

When all the factors are analyzed, the essential differences between respondent and members of the armed forces become apparent. Respondent's relation to the Air Force is transient, part-time, and terminable at any time by either party. He is no more a "part" of the Air Force than any secretary in the Pentagon. Respondent's relation to the Air Force does not justify it having peacetime court martial jurisdiction over him.

IV. PEACETIME COURT MARTIAL POWER OVER CIVILIANS IS NOT "NECESSARY AND PROPER" FOR THE "REGULATION AND GOVERNMENT OF THE LAND AND NAVAL FORCES".

A. The Asserted Power Is Not "Proper".

Since respondent is not a member of the land and naval forces, nor in such a relationship to the forces to be treated as a member, he is entitled, when charged by the United States with committing a felony, to be tried by an Article III

court with the guarantees of trial by jury after indictment of a grand jury. Article 1, Section 8, Clause 14, authorizing Congress to make rules for the government and regulation of the land and naval forces, cannot be expanded by Clause 18 (the necessary and proper clause) to justify this extraordinary power because exercise of the power would conflict with other specific provisions of the Constitution. Expansion of court martial power to civilians in time of peace necessarily means an unconstitutional diminution of the judicial power under Article III. Expansion of court martial power to civilians in time of peace necessarily means depriving the civilians of the rights guaranteed them by the Fifth and Sixth Amendments.

It should be recalled that in *McCulloch v. Maryland* (U.S.), 4 Wheat. 579, Chief Justice Marshall was careful to establish that the Congress' power to incorporate was not prohibited by the Constitution. Only after finding the absence of any prohibition did he conclude that the power was necessary and proper to the enumerated powers. A similar holding cannot validly be made in the case at bar. The provisions of Article III and the Fifth and Sixth Amendments preclude any conclusion that the power asserted in this case is not prohibited by the Constitution. Since the asserted power is prohibited by other provisions of the Constitution, its use is not "proper."

Mr. Justice Frankfurter, concurring in *Reid v. Covert*, supra, 354 U.S. at 43, points out that:

"this court, applying appropriate methods of constitutional interpretation, has long held, and in a variety of situations, that in the exercise of a power specifically granted to it, Congress may sweep in what may be necessary to make effective the explicitly worded power. See *Jacob Ruppert, Inc. v. Caffrey*, 251 U.S. 264, especially 289 et seq., . . . *Purity Extract & Tonic Co. v. Lynch*, 226 U.S. 192, 201 . . . ; *Railroad Com. v. Chicago, B. & Q. R. Co.*, 257 U.S. 563, 588 . . ."

While this statement is of course correct, as is demonstrated

by the authorities referred to, none of these cases reach the precise issue presented by the instant case. In none of the cases cited, nor any found by counsel, has this Court ever held that Congress may transgress one of the specific guarantees of the Bill of Rights in order to "make effective the explicitly worded power." The reason, as Mr. Justice Frankfurter observes at 354 U.S. at 44, is because:

"The Constitution is an organic scheme of government to be dealt with as an entirety.

B. The Asserted Power Is Not "Necessary".

1. The Stated Reasons Why the Court Martial Power Is Needed Do Not Relate to the Mission of the Armed Forces Abroad.

The necessity for peacetime court martial jurisdiction over civilians by the military is not answered by arguments as to the necessity of civilians with the armed forces abroad. The question is not whether the armed forces need civilians as a part of their overseas installations but rather whether the military needs court martial jurisdiction over these civilians. We emphasize this fact because the petitioner devotes considerable argument to the necessity of the military being accompanied by civilians abroad. Of course, if there were no need for civilians accompanying the armed forces abroad, there would obviously be no need for court martial jurisdiction. But the converse is not necessarily true. A separate and distinct question is involved as to whether peacetime court martial jurisdiction is necessary over these civilians.

It should be observed that the reasons why petitioners say that peacetime court martial jurisdiction is necessary are the same as were presented in *Reid v. Covert* and found wanting. Petitioners offer no new reasons and also offer no reasons for distinguishing between civilian employees and civilian dependents.

Petitioners' reasons are primarily based upon the replies

which the Department of Defense solicited from overseas commanders in *Reid v. Covert*, supra. Some of the replies were printed as Appendix A in the Supplemental Brief for Appellant and Petitioner on Rehearing in *Covert*. When the replies are examined, it is apparent that the reasons stated for the necessity of court martial jurisdiction over civilians for the most part have no relation to the military's function abroad and certainly do not justify peacetime court martial jurisdiction.

Gen. William R. Woodward, Commanding General of the headquarters responsible for logistical support to United States Forces in the forward area of France and Germany, detailed his reasons for the continued need for jurisdiction over civilian employees and dependents. He stated his reasons in the following order:

a. "To prevent black-market operations and to punish those who engage in such activities."

b. "To prevent reckless and drunken driving on the public roads in France and on U. S. military installations."

c. "To enable me to control them [civilian employees and dependents] in emergencies such as might occur in the evacuation of non-combatants in threatened areas."

d. "To protect the security of this command and to punish those who imperil such security."

e. "To insure the continued satisfactory operation of the NATO's status of forces agreement in the advance section."

1. Preventing black market operations is obviously the function of the host country. It is the host country's laws which are transgressed. It is the host country's economy which is disrupted. While the United States is interested in its allies' economic stability, it could hardly be considered that this interest is the responsibility of the Department of Defense.

2. Preventing reckless and drunken driving on French roads is clearly a function of the French Government. Preventing reckless and drunken driving on United States military installations may be part of the function of our armed

forces abroad but since these bases are legally the property of the host country, the crimes are violations of the laws of the host country. In any event, it can hardly be validly contended that to accomplish this objective requires general court martial jurisdiction over civilians. If the offense were serious, it would be a violation of the host country's laws and would be punished as such by the host country. (See, *New Legal Era for Troops and Dependents in Germany*, Army-Navy-Air Force Register and Defense Times, August 15, 1959, p. 11.) If the violation were minor, it would obviously not require a general court martial but could be handled administratively.

Of the 5,026 offenses committed by employees and dependents during the period 1 December 1954 to 30 November 1958, subject to primary foreign jurisdiction, 4,357 were "traffic offenses," including drunken and reckless driving and fleeing scene of accident. (Pet. Br., p. 75).

3. Gen. Woodward's third reason—to control civilians in emergencies such as might occur in evacuation of threatened areas—is not relevant to peacetime. It would presuppose a wartime situation in which the military would have court martial jurisdiction under Article 2(10) U.C.M.J., 10 U.S.C. § 802(10).

4. Preventing disclosure of classified information is, of course, part of the mission of the armed forces abroad, but no reason is shown why peacetime court martial jurisdiction over civilians is necessary to accomplish this objective. Only a small portion of civilian employees and dependents have access to classified information. Respondent, for example, had no clearance for classified information. Further, the offense is rarely committed. If such an offense did occur, it would be a violation of the Criminal Code (18 U.S.C. §§ 792-797) and could be prosecuted in the United States even though committed abroad (Cf. 18 U.S.C. § 791). Finally, the offense is of such gravity that trial in an Article III court would seem to be required.

5. Continued satisfactory operation of the status of forces agreements becomes a reason for peacetime court martial jurisdiction over civilians only by virtue of inverted logic. (It should be noted that there is no status of forces agreement in Morocco (Background—Three New African Nations, Morocco-Tunisia-Libya, Dept. of State Publication 6567, December 1957, page 11), where respondent lived and worked for the Air Force.) Without these agreements, jurisdiction over crimes committed by Americans in the host country lies in the host country. *Schooner Exchange v. McFaddon*, 7 Cranch 116. The status of forces agreements were negotiated to vest this jurisdiction in the American military rather than in the host countries. The primary purpose of the agreements was to change the jurisdiction from that of the host country to that of the American military in the case of *members* of the armed forces. Civilians were not the major concern of the negotiations. And even in the case of civilians, most agreements provide that primary jurisdiction over civilian dependents lies in the host country rather than in the American military. In any event, a decision by this Court that peacetime jurisdiction of civilians is unconstitutional would simply return jurisdiction to the host country, where it was prior to the status of forces agreement.

Gen. Bruce C. Clarke, Commanding General of the headquarters for all United States Army combat units stationed in Western Germany, stated that: "Court martial cases involving civilian dependents are comparatively rare." He states that our relations with the German Government are embarrassed by the commission of "comparatively minor offenses such as black market transactions with German nationals, unlawful currency transactions, infringement of German customs laws and violation of German traffic laws" (id., p. 107). Gen. Clarke stated: "If the military lacks the authority to punish civilian dependents for such offenses, the result would be to increase the incidence of these offenses upon the part of the military." This is, of course, no

valid reason for peacetime court martial jurisdiction over civilians. The question is not whether but how civilians are to be tried. As Mr. Justice Frankfurter observed in *Reid v. Covert*, 354 U.S. at 48:

“The method of trial alone is in issue.”

Gen. Charles D. Palmer, Commanding General of the operational headquarters for all United States Army units based in Japan, Okinawa and Korea, states that black market offenses “by civilians as well as military personnel, although relatively minor offenses, have represented a continuing problem to this Command because of the concern of the Government of Japan with the effect of these offenses upon the local economy” (*id.*, p. 114). The statement itself illustrates that the problem involved is one of the host country, not one related to the function of the armed forces abroad.

Capt. J. P. Walker, Commander of the United States Naval Activities in Spain, states as an additional basis for the necessity which justifies peacetime court martial jurisdiction over civilian dependents abroad, the language barrier (*id.*, p. 123). While this is undoubtedly a problem to an American charged with a crime by a foreign country, it would seem obvious that the problem can be solved by the use of interpreters.

Petitioner's stated reasons for the peacetime court martial jurisdiction over civilians are also premised upon the assumption that these civilians live abroad in “American enclaves” which are somehow isolated and apart from the host country. The premise does not bear up under analysis. Even for members of the armed forces, the military does not take over all judicial functions in its “American enclaves.” For example, in civil suits even between Americans, jurisdiction lies in the foreign country. Similarly, the American military does not exercise any jurisdiction over marriage, divorce, or matters of probate law. See, O'Donnell, *The American Invasion of Spain*, Saturday Evening Post, Jan. 28, 1958, pp. 26, 87-90.

Finally, it should be noted that even for members of the armed forces, not all crimes are deemed necessary to be tried by a court martial. In the United States, for example, non-military offenses are almost always tried in State or Federal courts, not in court martials. Even abroad, in situations where primary jurisdiction lies in the United States, it is often waived and there are, of course, numerous situations where primary jurisdiction even over members of the armed forces belongs to and remains in the host country. *Wilson v. Girard*, 354 U.S. 524.

2. No Valid Explanation is Given for Treating Respondent Differently from Other Americans Employed by the United States Abroad, and from Indigenous Employees.

Not all persons employed by the United States Government abroad are made subject to court martial jurisdiction and no valid explanation is given for differentiating between the various categories.

As of 1957, the Department of Defense employed 76,514 non-American civilians in foreign countries, and contracted with foreign governments for the employment of 275,640 additional indigenous personnel. See, U.S. Civil Service Commission, *Federal Employment Statistics Bulletin*, October, 1956, p. 9; See, also, 103 Cong. Rec. 614 (daily id. Jan. 17, 1957). As of June there were 188,517 foreign nationals working under contract arrangements. 105 Cong. Rec. p. 13387 (daily id. July 30, 1959).

These indigenous employees have as much access to our overseas bases as do the 25,000 employees such as respondent. Their jobs are in many cases identical to American civilian employees. Yet there is no court martial power over these civilians and no request to Congress or the host countries that they be made subject to United States court martial jurisdiction. The Armed Forces abroad apparently function and successfully execute their assigned missions

without court martial power. No valid reason has been offered to distinguish respondent from these other Defense Department employees. Hence, since the forces can operate successfully without court martial power over large numbers of its employees, it seems obvious that it could operate successfully without court martial power over 25,000 of its employees who are United States citizens.

In addition, other dependents of the United States Government employ 59,656 American citizens abroad. As of June 30, 1959, there were 26,949 employed by the State Department; 8,088 employed by United States Information Agency; 1,521 employed by the Federal Aviation Agency, and 1,221 employed by the Department of Agriculture. 105 Cong. Rec. p. 13386 (daily ed., July 30, 1959). None of these American citizens is subject to court martial jurisdiction and no valid reason is advanced why the 25,000 citizens employed by the Defense Department should be treated differently. If there is a strong, compelling necessity for subjecting Defense Department employees who are United States citizens to peacetime court martial, it would seem there would be a similar necessity in the case of other United States citizen employees abroad. No necessity is shown and it must be concluded that the other departments of the Government function successfully without this extraordinary power.

Further, American tourists and Americans employed by private concerns abroad make themselves subject to foreign jurisdiction. There is no valid reason why those Defense Department employees who are United States citizens should be singled out for court martial jurisdiction, and the others left subject to the jurisdiction of the foreign countries. It would be far more consonant with our traditions that civilians be tried by civilian courts (foreign civilian courts, if need be) than to have civilians tried by courts martial in time of peace.

CONCLUSION

In view of the foregoing, it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

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September 1959.

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SUPREME COURT. U. S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 37

BRUCE WILSON,

Petitioner,

MAJOR GENERAL JOHN F. BOHLENDER,

COMMANDER, FITZSIMONS ARMY HOSPITAL

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

BRIEF FOR THE PETITIONER

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 37

BRUCE WILSON,

Petitioner,

v.

MAJOR GENERAL JOHN F. BOHLENDER,

COMMANDER, FITZSIMONS ARMY HOSPITAL

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

BRIEF FOR THE PETITIONER

Opinions Below

The opinion of the District Court (R. 60-72) is reported at 167 F. Supp. 791. The opinion of the United States Court of Military Appeals sustaining military jurisdiction over the petitioner (R. 53-60) is reported at 9 USCMA 60 and 25 CMR 322.¹

¹ The same system of military law abbreviations set forth in Appendix A of the appellee's brief in *Singleton* (No. 22) is used throughout the present brief.

Jurisdiction

The order of the District Court denying the petition for a writ of habeas corpus was entered on November 10, 1958 (R. 72). A notice of appeal to the United States Court of Appeals for the Tenth Circuit was filed on December 2, 1958 (R. 73), and the record on appeal was docketed in that court on December 23, 1958 (R. 74). The case has not been heard, submitted to, or decided by the Court of Appeals. The petition for a writ of certiorari was filed on December 30, 1958, and granted on February 24, 1959 (R. 75), at which time petitioner's motion to proceed *in forma pauperis* was also granted (R. 75; 359 U.S. 906). The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

Questions Presented

1. Whether a civilian employee of the armed forces may constitutionally be tried by court-martial overseas in time of peace for a non-capital offense.
2. Whether petitioner's trial by court-martial can be sustained on the basis that it represented an exercise of military government jurisdiction in occupied Berlin.

Constitutional Provisions and Statutes Involved

The constitutional and some of the statutory provisions involved appear at pp. 2-4 of respondent's brief herein. Additional statutory provisions referred to throughout the argument are set forth in Appendix B of the *Singleton* brief in No. 22.

Statement

Petitioner, an American citizen, was a civilian employee of the Department of the Army assigned to the Comptroller Division, Berlin Command, in the United States Sector of Berlin (R. 1). He went to Berlin on a passport accrediting him to the United States Army Commander in Berlin, and entered and departed from Berlin from time to time pursuant to military orders during the term of his employment. He, like other civilian employees of the Army in Berlin, was supplied with military housing and exchange facilities (R. 49).

Prior to 1956, he had an excellent record in Federal civilian employment (R. 40-42). In June 1956, when he was 52 years old (R. 26, 29), he was served with charges preferred under the Uniform Code of Military Justice accusing him of various offenses that were wholly non-military in nature (R. 19-22), viz., three acts of sodomy in violation of Art. 125, UCMJ (50 U.S.C. [1952 ed.] §719), and accusing him also of two lewd and lascivious acts with persons under the age of sixteen, and with twice displaying lewd and lascivious pictures to minors with intent to arouse their sexual desires, the latter all in violation of Art. 134, UCMJ (50 U.S.C. [1952 ed.] §728).²

One day before the trial, in August 1956, petitioner tendered his resignation from federal employment, but it was not accepted (R. 29-30, 47, 49, 51, 57).

At the trial, on August 21, 1956 (R. 16)—after the first *Covert-Krueger* opinions but before the second ones following rehearing—petitioner entered a plea to the juris-

² Inasmuch as all of the offenses charged were committed prior to the effective date of the 1956 revision of Title 10, U.S.C., we cite only the earlier U.S.C. reference. The substantive content of the Articles in question was not changed in the revision.

diction of the court-martial on the ground that he was a civilian; this plea was overruled after argument (R. 24, 47-52).

Thereupon petitioner pleaded guilty to all the charges and specifications (R. 24), and was duly found guilty accordingly (R. 26).

In the proceedings to determine the sentence, petitioner introduced two stipulations, (Def. Ex. D and E; R. 43-46) as to expert testimony concerning his mental condition.

Dr. Jaffe, a German civilian psychiatrist who examined petitioner, would have testified after setting forth his findings that (R. 45) petitioner "should therefore be considered a psychopathic personality on the borderline of schizophrenia."

The other, Capt. Bertram, an American military psychiatrist, concluded (R. 46) that "although Mr. Wilson is not psychotic, he is a psychopathic personality tending toward and on the borderline of schizophrenia."

Both experts stated that petitioner was legally responsible, and able to understand the proceedings and to cooperate in his defense (R. 44, 46).

The maximum penalty for the offenses with which petitioner was charged was confinement at hard labor for 29 years and 8 months (R. 38); the court-martial sentenced him to confinement at hard labor for ten years (R. 39), which the convening authority on review cut to five (R. 8).

After affirmance by a Board of Review (R. 54, 60), the Court of Military Appeals sustained the jurisdiction of the court-martial on the ground that, as applied to petitioner's case, Art. 2(11), UCMJ, was constitutional, notwithstanding anything held in *Reid v. Covert*, 354 U.S. 1 (R. 53-60; 9 USCMA 60, 25 CMR 322). The court said in footnote 1

of its opinion (R. 55), "We prefer to reach the question of jurisdiction in this case under the provisions of subdivision 11 of Article 2 rather than consider whether the circumstances obtaining in Berlin constitute that area occupied territory, as contended by Army Government counsel."

The Court of Military Appeals suggested (R. 55), apparently on the basis of the jurisdictional argument at the trial (R. 50), that petitioner "was not subject to the civil or criminal jurisdiction of the Berlin courts by virtue of the provisions of Allied Kommandatura Law No. 7."³

Meanwhile, petitioner had been confined in no less than five military institutions (R. 2, 8, 11, 12, 13, 14), the last one being Fitzsimons Army Hospital in Denver, Colorado (R. 1, 5, 10).

While there, he brought the present habeas corpus proceeding, naming the commander of that installation as respondent (R. 1-3).

The district judge denied the petition (R. 60-72), essentially on the grounds set forth by the Court of Military Appeals. The district judge specifically refused to follow the decision of the District of Columbia Circuit in the *Guagliardo* case, now No. 21, this Term, preferring the views of the dissenting judge therein (R. 67-68).

Nothing was said by the district judge regarding the Berlin-occupied territory issue, which was presented by respondent as an alternative ground for denying the writ.

By leave of court, petitioner appealed to the United States Court of Appeals for the Tenth Circuit *in forma pauperis* (R. 73), and perfected his appeal by lodging the record there (R. 74).

³ See, however, Resp. Br. 20-21, and p. 100, *infra*.

He sought, and this Court granted, certiorari before judgment in the court below (R. 75-76); and his motion to proceed *in forma pauperis* was also granted (359 U.S. 906).

Summary of Argument

I. Art. 2(11), UCMJ, is separable, so that the constitutional issue in this case must be decided; the argument on this point in the *Singleton* case, No. 22, is incorporated by reference.

II. The prerequisite to the exercise of military jurisdiction is that the accused have a military status, and consequently, with a narrow wartime exception not here applicable, no civilian can constitutionally be tried by court-martial in time of peace regardless of his relationship to the military. On this point also the argument in *Singleton* is incorporated by reference, and here it is significant that in 1957 the Government argued that "For purposes of court-martial jurisdiction, there is no valid distinction between civilians employed by the armed forces and civilian dependents."

III. Apart from a limited number of essentially episodic instances, many of them flagrantly illegal on their face, there is no basis whatever in either history or practice for the peacetime military jurisdiction over civilians employed by or accompanying the forces that is now sought to be asserted.

A. Accurate evaluation of the available military historical materials requires distinctions that the Government's discussion fails to make.

1. First of all, it is necessary to differentiate between episodic instances that reflect only the acts of subordinates

and a settled course of official rulings that represent the considered judgment of higher authority.

2. Next, it is necessary to differentiate between (a) trials by court-martial of civilians accompanying the forces "in the field" in time of war or actual hostilities, which are clearly legal; (b) similar trials in time of peace in areas where no system of civil judicature was in operation, the jurisdiction now in dispute; (c) similar trials in time of peace in areas where the civil courts were functioning, the legality of which the Government does not attempt to defend; and (d) similar trials of civilians wholly unconnected with the forces, which were always illegal.

3. It is similarly necessary to differentiate between war-time military jurisdiction over civilians who aid the enemy or who violate the laws of war, see *Ex parte Quirin*, 317 U.S. 1, and peacetime military jurisdiction over civilians committing ordinary offenses, which is in question here.

4. It is likewise necessary to differentiate between military regulation of civilian activities in the military camp, violation of which may lead to dismissal from employment or ouster from the camp, and the exercise of military jurisdiction through trial by court-martial of civilians who offend against those regulations:

5. Next, it is necessary to distinguish between the power of a court-martial to punish a civilian for obstructing its processes and the power of such a tribunal to try and punish a civilian for committing a military offense. From 1786 to 1901, a civilian who failed or refused to testify before a court-martial violated no law, and in the last named year such acts were made, as they have since remained, purely civil offenses. And the traditional power of a court-martial to punish all contemnors, regardless of

status, does not constitute any exercise of military jurisdiction.

6. It is further necessary to distinguish between persons with civilian status and those who though soldiers bore apparently civilian titles. Musicians, mechanics, farriers and the like were purely soldiers. Some artificers were soldiers, others may have been civilians. But American artillerymen were always soldiers.

7. British analogies must be used with caution, for while American military forces were always under the control of Congress, Parliament seems not to have governed the British Army outside the realm until early in the XIX Century; such control before then was vested solely in the Crown.

8. American naval precedents furnish uncertain guides, primarily because the Articles for the Government of the Navy contained no provision concerning accompanying civilians such as the Articles of War did. Indeed, Congress conferred no such jurisdiction until 1943, and then limited it to time of war or national emergency. Consequently the holding of *Johnson v. Sayre*, 148 U.S. 109, is, not that the Navy could try civilians by court-martial, but only that a Navy paymaster's clerk was a person in the naval service.

B. The only known English ruling from the XVIII Century held that there was no military jurisdiction over accompanying civilians in time of peace. *Mostyn v. Fabrigas*, 1 Cowp. 161, 175-176. And the British Parliament in 1765 refused to empower military commanders in the North American wilderness to try civilians by court-martial. St. Geo. III, c. 33, §XXV; see discussion in *Singleton* brief.

C. The many military trials of civilians by the Continental Army during the Revolutionary War do not support the peacetime military jurisdiction now asserted. The civilian officials then tried were plainly serving in time of war and "in the field"; the other civilians were either spies, or else inhabitants, tried not under the Articles of War but under special resolves of Congress.

D. Military trials of civilians in the 1790s, at a time when there was endemic conflict between the military and civilian authorities, reflect primarily illegal assertions of military power, and do not establish any authoritatively settled practice, such as the Government now urges, of exercising military jurisdiction only over civilians actually with the army in areas where there is no civil jurisdiction.

1. These trials include some "in the field"—plainly legal; some of civilians not connected with the army at all—plainly illegal; some of accompanying civilians in settled communities—not now sought to be defended; and some of accompanying civilians in the wilderness.

2. These trials, therefore, reflect not a settled legal practice, but simply show the nature of and reason for the conflict between military officers and civil officials that characterized the American frontier in the 1790s. Moreover, the civilian status of about a quarter of the persons whose trials are listed is not clear. And the obvious abuses of authority on the part of the military commanders concerned militate against considering any of their actions as reflecting a consistent course of constitutional interpretation.

3. Many incidents of these trials—their obvious irregularities, the consistent brutality of their sentences—are not such as to establish their legitimacy.

4. None of the foregoing trials were ever approved by higher civil authority; to the contrary, they appear to violate policies formulated by civil authority, notably by President Washington himself. There is no evidence that any of them ever came to the attention of Congress, which long postponed a revision of the Continental Articles of War in order to make them conform to the subsequently adopted Constitution.

5. The foregoing trials are not a safe guide to constitutional interpretation, and were moreover (see Appendix D) regarded contemporaneously as having taken place in time of war.

E. The peacetime military jurisdiction exercised over civilians from 1825 to 1860 was episodic in the extreme—seven such trials in all—and similarly reflected illegality rather than authoritative constitutional interpretation, inasmuch as many of them took place where civil courts were operating.

F. Extensions of military jurisdiction during the Civil War must be regarded with caution; *Ex parte Milligan*, 4 Wall. 2, exposed the patent unconstitutionality of Judge Advocate General Holt's military trials of civilians. He is accordingly not a safe guide as to the extent of military jurisdiction. Nor was the 37th Congress, which enacted the recapture provision ultimately condemned in *Toth v. Quarles*, 350 U.S. 11, as well as the plainly unconstitutional military jurisdiction over contractors.

G. Present-day boundaries are fixed, not by the sporadic excesses of the past, but by the considered rulings of the Government's law officers—the Attorney General and The Judge Advocate General of the Army—which condemned those excesses as illegal and unconstitutional.

H. The fact that after three and a half years the Government still accords silent treatment to The Judge Advocate General's post trader ruling is eloquent testimony to the importance of that ruling in the present connection.

I. No constitutional justification was ever offered in 1916 for the extension of military jurisdiction then enacted at General Crowder's urging, nor did he even suggest the existence of a constitutional question. He seems to have rested his proposal on two inarticulate premises: first, that the Constitution did not apply to the acts of American officers overseas; second, that the Fifth Amendment granted court-martial jurisdiction over "cases arising in the land or naval forces." Both of these premises have since been authoritatively disapproved: *Balzac v. Porto Rico*, 258 U.S. 298, 312; *Toth v. Quarles*, 350 U.S. 11, 14.

J. On the only occasions from 1793 to 1916 when the Attorney General and The Judge Advocate General of the Army gave reasoned consideration to the question whether trials of civilians by court-martial in time of peace contravened constitutional limitations, they answered that question with a resounding affirmative. In 1866, Gen. Holt submitted a brief memorandum that did not mention the Constitution, nor did Gen. Crowder in 1916 discuss any constitutional question. The only reasoned discussions came in 1877, when The Judge Advocate General of the Army recalled the constitutional boundaries of military power to the Attorney General, who had momentarily overlooked them; see full text in Appendix C.

IV. No controlling or indeed persuasive judicial authority sustains the peacetime military jurisdiction over civilians that is now asserted.

A. What was said in *Duncan v. Kahanamoku*, 327 U.S. 304, 313, was dictum on its face and moreover referred only to wartime cases.

B. The lower court cases relied on are either not in point, because involving military jurisdiction exercised in wartime; or else unpersuasive. All but one of the decisions dealing with peacetime jurisdiction antedate *Reid v. Covert*, 354 U.S. 1, and that one cites the withdrawn opinions therein.

V. The Government's arguments as to the alleged necessity of trying civilian employees by court-martial and the alleged lack of acceptable alternatives are incomplete to the point of being misleading. Under this heading we incorporate by reference, from the *Singleton* brief in No. 22, the discussion regarding the basic inconsistency between *Wilson v. Girard*, 354 U.S. 524, and the contentions now being made in support of the military jurisdiction, as well as the suggestion that the Court should call for the production of named recent agreements with foreign countries that appear to cast doubt on assertions now being made.

A. The Government omits to advise the Court that the reason why so many civilian employees are now accompanying the armed forces abroad is purely budgetary—a fact easily established by reference to legislation, committee reports, and appropriation hearings.

B. The Government omits to explain to the Court why, if its civilian employees must be subjected to military discipline, they cannot be incorporated in the armed forces, either voluntarily, by enlistment or commissioning, or, if need be, by draft—as the doctors are.

C. The cases of the civilian employees now before the Court fail to establish any inseparable connection between them and their offenses and the military forces.

1. Grisham, of No. 58, a cost accountant on the payroll of the U. S. District Engineer at Nashville, came to France, rented an apartment in the City of Orleans, and a few weeks later killed his wife there after a cocktail party. He was then held in French custody for over two weeks. Why his offense could not have been treated like any other homicide by an American on French soil, viz., by trial in a French court, is not explained.

2. The present petitioner, described by two doctors as "a psychopathic personality on the borderline of schizophrenia," pleaded guilty to a series of sexual offenses. If those had been committed in the District of Columbia, he would pursuant to Congressional direction have been committed to Saint Elizabeths Hospital as a sexual psychopath. What military reason requires that he be tried by court-martial and then confined for five years in a penitentiary?

3. Guagliardo, of No. 21, was charged with committing two offenses against the United States—larceny and conspiracy—so that Title 18 reached him and he could have been flown back to the United States for trial. He also was held by the local civil authorities. Nowhere is there offered a convincing explanation why his acts could only have been dealt with by an Air Force court-martial.

D. The contentions in support of the jurisdiction simply repeat what was said in 1956 and 1957 and fail to reflect any genuine effort to restudy the problem of law enforcement in respect of civilian employees overseas beyond

"Let's see if we can't keep *Reid v. Covert* limited." Not even the espionage chapter of Title 18 has been amended to reach security violations by such employees abroad. The basic approach is still that of the Army Board of Review in the *Singleton* case, that "the necessity for military jurisdiction * * * is sufficient to overcome the requirements of Article III and the Fifth and Sixth Amendments."

VI. Even on the assumption that Berlin is still occupied territory for all purposes, petitioner's trial by court-martial cannot be sustained as an exercise of military government jurisdiction over him. We will assume that Berlin continues under military occupation, and of course military trials may validly be held in such territory.

A. But the Army did not purport to exercise military government jurisdiction over petitioner, his trial was never sustained at any stage on that basis, and it cannot be converted into a military government trial now.

1, 2. Petitioner's status was set forth in the charges preferred against him in terms drawn from Art. 2(11), UCMJ; he was not described either as "a person resident in occupied territory" or as "a person subject to the law of war." And military jurisdiction over him was sustained on that basis; the Court of Military Appeals refused to consider the occupied territory issue. Nor did the habeas corpus court proceed on that basis.

3, 4. It is now too late to invoke the alleged alternative jurisdiction. While the military rule, like the civil one, is that mis-citation of the statutory provision being violated is immaterial, military law nonetheless has consistently held that jurisdiction must be shown to exist at the outset, and that it cannot be supplied by subsequent ratification.

Therefore, once it is conceded that Art. 2(11), under which petitioner was tried as an accompanying civilian, could not validly reach him, then his trial by court-martial cannot be retroactively validated under Art. 18 on the theory that he was simply a resident of occupied territory and as such subject to the law of war.

5. The contrary holding of the Court of Military Appeals in *Schultz*, 1 USMA 512, which rests on the supposed authority of *Givens v. Zerbst*, 255 U.S. 11, cannot be supported. The *Givens* case held that the truth of jurisdictional averments in a court-martial record could be independently established on collateral attack, even though they were not otherwise proved in the court-martial proceedings. The *Givens* case did not hold that, jurisdiction being collaterally challenged, new allegations of jurisdiction that would change the court-martial record could then be substituted and sustained.

6. Of course military trials may validly be held in occupied territory. But no military government jurisdiction was in fact exercised in this case.

B. Indeed, no military government jurisdiction has been exercised in Berlin by the United States since May 5, 1955; there are now no occupation courts there.

C. It follows that any attempt now to exercise a military government jurisdiction limited to American civilians accompanying the armed forces abroad, at the same time excluding German nationals and all other residents of other nationality not connected with the armed forces, would be discriminatory and hence invalid. *Yick Wo v. Hopkins*, 118 U.S. 356; *Griffin v. Illinois*, 351 U.S. 12, 17. The Due Process Clause limits even the war power. *United States v. Cohen Grocery Co.*, 255 U.S. 81.

The discrimination issue will probably not be reached, inasmuch as the military authorities, through and including the Court of Military Appeals, proceeded on the basis that an Art. 2(11) jurisdiction was being exercised.

It should be added that the terms of Allied Kommandatura Law No. 7 specifically provide for an authorization to German courts to try American civilians who accompany the armed forces. Hence a holding that such civilians were not triable by court-martial would in no sense mean that their misdeeds would go unpunished.

A R G U M E N T

I. Fairly Construed, Article 2(11) of the Uniform Code of Military Justice Is Separable, So That the Constitutional Issue in This Case Must Be Decided.

If the District of Columbia Circuit in the *Guagliardo* case, No. 21, this Term, was correct in holding that Art. 2(11), UCMJ, is not separable, so that its application to a civilian employee charged with a non-capital crime "cannot be validly carved out of the invalid general spread of that provision" (R. 41, No. 21), then the judgment below in this case, which similarly involved a civilian employee charged with a non-capital crime, must be reversed—unless the Government can show that the present trial was a valid exercise of military government jurisdiction, which, as we indicate below, pp. 90-100, it cannot do.

We believe, however, that Art. 2(11), UCMJ, properly construed, is separable, and that the Court accordingly is required to decide the constitutional issue. On that point, petitioner adopts and incorporates the arguments made on behalf of the relator in the *Singleton-Dial* case; see appellee's brief in No. 22, at pp. 16-23.

II. The Prerequisite to the Exercise of Military Jurisdiction Is That the Accused Have a Military Status, and Consequently (With a Narrow Wartime Exception Not Here Applicable) No Civilian Can Be Constitutionally Tried by Court-Martial Regardless of His Relationship to the Military.

Petitioner's basic position is that, because he was a civilian at all material times, without military status, he was not amenable to trial by court-martial in time of peace.

In order to shorten what at best must necessarily be a long brief, petitioner adopts and incorporates by reference the arguments made on behalf of the relator-appellee in the *Singleton-Dial* case, No. 22, with reference to—

A. The matters decided by *Reid v. Covert* and consequently foreclosed here (pp. 24-27);

B. The inapplicable exception subjecting to military law civilians who in time of war are with the armed forces "in the field," i.e., at a time and in the area of military operations against an enemy (pp. 28-33);

C. The general proposition that military jurisdiction depends on military status (pp. 34-38); and

D. The proposition that the Necessary and Proper Clause does not expand Clause 14 so as to include civilians within "land and naval Forces" (pp. 81-103).

Accordingly, petitioner's arguments under the present heading are restricted to one narrow but decisive issue, viz., that for purposes of court-martial jurisdiction there is no difference between civilian dependents and civilian employees.

On that issue, we vouch to warranty one of the Government's basic arguments at the *Covert* rehearing (Supple-

mental Brief for Appellant and Petitioner on Rehearing, Nos. 701 & 713, Oct. T. 1955, Point ID, pp. 37-40), viz., that—

“For purposes of court-martial jurisdiction, there is no valid distinction between civilians employed by the armed forces and civilian dependents.”

The Government still appears to be making the same argument today, contending in *Guagliardo* (No. 21) that all civilian employees are triable by court-martial, and urging in *Singleton* (No. 22) that all civilian dependents are similarly triable. Any difference between the two arguments seems to be primarily one of emphasis and fervor; a consecutive examination of the Government's briefs in the two cases leads the reader to infer that The Pentagon is more concerned with military jurisdiction over employees than over dependents.

But that is only an inference; there is no admission that any difference exists between the two classes; and there is no disclaimer of the Government's 1957 position, quoted above. Accordingly, we await with interest the documentation of the announcement (Pet. Br., No. 21, p. 27, note 8) that “The Government does not concede that a civilian employee charged with a capital offense is not amenable to court-martial under the Constitution. See *Grisham v. Hagan*, No. 58, this Term.”

We believe the factor of civilian status to be decisive in all four cases. And, while we are prepared to incorporate by reference the legal arguments made on behalf of Mrs. Dial in No. 22, in support of that proposition, the history of asserted military jurisdiction over civilian employees is replete with so many more instances that separate treatment of the pertinent historical materials is required in this case.

III. Apart From a Limited Number of Essentially Episodic Instances, Many of Them Flagrantly Illegal on Their Face, There Is No Basis Whatever in Either History or Practice for the Peacetime Military Jurisdiction Over Civilians Employed by or Accompanying the Forces That Is Now Sought to Be Asserted.

This portion of our brief will, unavoidably, be rather long. The fact is—and we say so quite dispassionately, without either heat or resentment—that neither the historical materials adduced by the Government nor the interpretations drawn therefrom in the endeavor to establish a “solid basis” for the exercise of military jurisdiction over civilians, are reliable in any degree.

The materials are incomplete, the inferences drawn therefrom are inaccurate because important distinctions are overlooked, and evidence of authoritative practice in the form of published official rulings is entirely ignored, it would appear systematically so.

We do not propose to make a series of debating points in the pages that follow. Our primary aim in the discussion below is to assist the Court in making an accurate and historically sound evaluation of all available materials, first by emphasizing significant distinctions that serve as guidelines, and then by adducing a mass of additional instances drawn primarily from original sources, many of them still available only in manuscript. Thus, in Appendix A we list more than three times again as many civilians tried by court-martial during the Revolutionary War than the Government cited, while in Appendix B we note numerous instances of military trials of civilians in the 1790's that are not mentioned by the Government at all.

We believe, therefore, that our strictures directed at the unreliability of the Government's “history” cannot fairly be characterized as epithetical, and that they will be found

to be fully supported by the detailed analysis and documentation that follow.

- A. *Accurate evaluation of the available military-historical materials requires distinctions that the Government's discussion fails to make.*

Maitland, the greatest of legal historians, noted that Lord Coke obtained a copy of *The Mirror of Justices*, "and, as his habit was, devoured its contents with uncritical voracity. * * * It would be long to tell how much harm was thus done to the sober study of English legal history." *The Mirror of Justices* (Selden Soc., vol. 7, 1893) xi-x.

The Government has similarly devoured uncritically such historical materials as it presents (Pet. Br., No. 21, pp. 28-61), and in consequence correction of the errors therein also requires a lengthy screed. At least eight vital distinctions are overlooked in the cited discussion, a circumstance that substantially impairs the validity of the conclusions there reached.

1. *It is necessary to differentiate between episodic instances reflecting only the acts of subordinates and a settled course of official rulings representing the considered judgment of higher authority.*

It should hardly be necessary to labor the proposition that the considered judgment of higher authority, reached after mature deliberation, is entitled to more weight in determining the legality of a challenged practice than are earlier instances of action by subordinates that were not submitted to superiors for approval or disapproval.

Yet here the Government appears to place more reliance on scattered episodes than on the subsequent authoritative condemnation of a practice. It relies on 7 trials of sutlers

and the like from 1825 to 1858 (Pet. Br., No. 21, p. 56, note 27), and gives those instances more weight than any of the later Judge Advocate General's opinions to the contrary (*infra*, pp. 65-70), many of which it refuses even to cite. Otherwise stated, the argument seems to be that a jurisdiction sporadically and episodically exerted, without legal scrutiny, establishes the incorrectness of subsequent formal legal opinions which held that this jurisdiction could not be legally exercised.

A fair parallel would be an attempt to demonstrate the legality of trials by military commissions during the Civil War by citing the instances collected in Dig. Op. JAG, 1868, pp. 225-232, and by disregarding their condemnation in *Ex parte Milligan*, 4 Wall. 2, and the consequent elimination of those "precedents" from the 1880 edition of the same Digest.

2. *It is necessary to differentiate between (a) trials by court-martial of civilians accompanying the army "in the field" in time of war or actual hostilities, (b) similar trials in time of peace in areas where no system of civil judicature was in operation, (c) similar trials in time of peace in areas where the civil courts were functioning, and (d) similar trials of civilians wholly unconnected with the forces.*

In disregard of a whole series of published rulings (which it does not cite), the Government (Pet. Br., No. 21, pp. 52-61) insists that the "in the field" limitation is invalid, and that historical evidence establishes the validity of military trials of civilian employees in areas where no system of civil judicature was in operation.

For reasons already set forth in the *Singleton* brief, in No. 22 (and further developed below, pp. 65-70), we

cannot agree that the limitation to "in the field" is capable of thus being ignored and attempted to be verbalized away.

Moreover, in evaluating the persuasive worth of military trials of civilian employees in time of peace, we think it essential to distinguish between those that took place in the wilderness, where the civil courts were not functioning; those that occurred in settled communities, where judicial process ran unimpeded; and those of civilians having no connection whatever with the forces. Certainly the fact that one sutler was tried at Fort Monroe in 1825 and another at Fort Washington, Maryland in the same year (Pet. Br., No. 21, p. 56, note 37) is no precedent for a like trial today, but simply evidence of earlier disregard of the Sixth Amendment. Similarly, the military trials *tempore* Generals Wayne and Wilkinson of civilians unconnected with the Army (*infra*, page 39, and Appendix B), do not infuse such performances with constitutional validity, then or now. And, as we point out in detail below, the numerous similar instances reflect, not a settled military jurisdiction limited to areas where the civil courts could not operate, but a failure on the part of the Army to restrict itself within constitutional boundaries, failure which, as will be shown, resulted in sharp conflicts with civil authority.

3. *It is necessary to differentiate between wartime military jurisdiction over civilians who aid the enemy, and peacetime military jurisdiction over civilians committing ordinary offenses.*

The citation in the argument for the military jurisdiction of the conviction of a civilian by Continental court-martial in 1778 for the offense of counterfeiting (Pet. Br., No. 21, note 25 at p. 41, citing 13 *Writings of Washington* 54), and AW 56 and 57 of 1806 (same brief, note 31, pp. 48-49), blurs a vital distinction between peace and war.

Spies are triable by military tribunal because they violate the laws of war. *Ex parte Quirin*, 317 U.S. 1. They cannot be so tried once the war is over. *Matter of Martin*, 45 Barb. 142, 31 How. Pr. 228.

We show below that the inhabitants tried by court-martial in the Revolutionary War for aiding the enemy in various aspects were, as Washington himself recognized, not tried under the Articles of War. And AW 56 and AW 57 of 1806 that denounced relieving and corresponding with the enemy simply carried forward that purely wartime jurisdiction, which has continued over the years. See AW 45 and AW 46 of 1874; AW 81 of 1916 through 1948; Art. 104, UCMJ; and note Winthrop's showing that this jurisdiction cannot be exercised in time of peace (*138-*142). After all, there being no public enemy in peacetime, the cited provisions at such a period are inoperative by their very terms. The cited articles represent, preeminently, an exercise of the war power, and are thus wholly inapposite here.

4. *It is necessary to differentiate between the military regulation of civilian activities in the military camp, and the exercise of military jurisdiction over civilians who offend against those regulations.*

The argument in favor of the military jurisdiction must, to be persuasive, distinguish between a military regulation of civilians, and military jurisdiction over civilians who violate such regulations as are made.

Today, in very large measure, military commanders regulate the conduct of civilians on their posts in the United States in connection with a variety of activities. Familiar examples are duties relating to facilities such as post exchanges, laundries, restaurants, theaters, and the like. Violation of the applicable regulations may, in proper cases,

lead to a termination of the offending civilian's further employment. But it does not follow for a moment that such civilian employees are subject to trial by court-martial.

Consequently the citations of the early Articles of War regulating the conduct of suttlng under pain of dismissal from further suttlng (Br. Articles of 1765, Sec. VIII, Art. 1; AW LXIV of 1775; Sec. VIII, Art. 1, of 1776; see Pet. Br., No. 21, p. 33, note 16; p. 36, note 22) are obviously irrelevant.

In this connection it is to be noted that one of the avowed purposes of the 1916 revision of the Articles of War was the elimination of these and similar essentially regulatory provisions, that were more appropriately set forth in Army Regulations, and had no place in a punitive code. See Sen. Rep. 130, 64th Cong., 1st sess., pp. 18, 20, 28, 100.

5. *It is necessary to distinguish between the power of a court-martial to punish a civilian for obstructing its processes and the power of such a tribunal to try and punish a civilian for committing a military offense.*

Much appears to be made, to the extent of speaking of "the broad view which the Continental Congress had of the reach of the court-martial power" (Pet. Br., No. 21, p. 37, note 23), of the circumstance that the earliest codes gave courts-martial power to punish civilians for contempt and for refusing to testify (AW XL of 1775; AW LIV of 1775; Sec. XIV, Arts. 6 and 14, of 1776; see Pet. Br., No. 21, pp. 35-36).

Here again, vital distinctions are being blurred.

(a) AW LIV of 1775 and later Sec. XIV, Art. 6, of 1776, gave to courts-martial power to punish civilians who refused to testify before them when duly called upon to do so.

The Government fails to point out that when, in 1786, Sec. XIV of the Articles of War was amended, the latter provision was repealed.

Therefore, from 1786 until 1901, the failure or refusal of a civilian to testify before a court-martial was not declared criminal by Congress. Finally, in 1901, it was made an offense triable in the civil courts. Sec. 1 of the Act of March 2, 1901, c. 809, 31 Stat. 950; see H.R. Rep. 1853, 56th Cong., 1st sess.; Sen. Rep. 1914, 56th Cong., 2d sess.; cf. *United States v. Praeger*, 149 Fed. 474 (W.D. Tex.). And it has remained a civil offense ever since. AW 23 of 1916 through 1948; Art. 47, UCMJ.

(b) The power given a court-martial to punish as for contempt anyone who disturbs its proceedings has however been continued. AW 12 of 1786; AW 76 of 1806; AW 86 of 1874; AW 32 of 1916 through 1948; Art. 48, UCMJ. But that power is to be sharply differentiated from the jurisdiction now asserted. As Winthrop said (*461-*462), "The enforcing of the [contempt] Article in the instance of a civil person is not an exercise of military *jurisdiction* over him. He is not subjected to trial and punishment for a military offence, but to the legal penalties of a defiance of the authority of the United States offered to its legally constituted representative." For, after all, a court-martial is a court of the United States. *Grafton v. United States*, 206 U.S. 333.

(c) Finally, we suggest that, before it is sought to generalize regarding the allegedly "broad view which the Continental Congress had of the reach of the court-martial power" (Pet. Br., No. 21, p. 37, note 23), the Continental Congress' refusal to adopt in 1787 the proposal to make civilians in the Northwest Territory even temporarily amenable to military jurisdiction (see the *Singleton* brief in No. 22, at pp. 90-94), had better be, as in the cited reference it has not been, taken into account.

6. *It is necessary to distinguish between persons with civilian status and persons who, although having military status, bear apparently civilian titles.*

Under this heading we deal with two sources of confusion:

(a) There is cited (Pet. Br., No. 21, p. 48), an Act of 1790 that made the existing Articles of War applicable to "commissioned officers, non-commissioned officers, privates, and *musicians*," and the word "musicians" is there italicized as if to indicate that such persons were civilians!

Nothing could be farther from the truth. The fact is that, down through World War I, many, many enlisted men were designated in the statute book by the name of their occupational specialty. The musicians of 1790 were just as much enlisted men as were the privates.

Musicians are similarly met with in the Act of Mar. 3, 1791, c. 28, 1 Stat. 222; as well as in that of Mar. 5, 1792, c. 9, 1 Stat. 241; the latter statute also names farriers, saddlers, and "artificers included as privates."

The Militia Law of May 8, 1792, c. 33, 1 Stat. 271, includes drummers, fifers or buglers, farriers, and trumpeters.

In the Act of May 30, 1796, c. 39, 1 Stat. 483, there are provisions for farriers, saddlers, trumpeters, musicians and artificers. Sappers, miners, musicians and artificers "to serve as privates" are met with in the Act of April 27, 1798, c. 33, 1 Stat. 552. Blacksmiths appear in addition in the Act of Mar. 3, 1799, c. 48, 1 Stat. 749.

Similar provisions continue in our military legislation through the National Defense Act of June 3, 1916, c. 134,

39 Stat. 166; here are listed alphabetically the essentially civilian titles there applied to enlisted men of full military status (§§ 11, 17-20): bugler, cargador, casemate electrician, chief mechanic, chief planter, cook, coxwain, engineer, fireman, horseshoer, master electrician, master engineer, master gunner, mechanic, musician, packmaster, plotter, saddler, wagoner.

In short, the musicians in the army of 1790 were not civilians in any sense.

(b) It is also urged, primarily on the basis of secondary works, that the artillerymen of the Continental and early United States Army were civilians (Pet. Br., No. 21, pp. 37-39).

In fact, American artillerymen then as now were soldiers.

(i) In a General Order of Sept. 2, 1777 (9 *Writings of Washington* 167), Sergeant Dickinson and Corporal Adair of the Artillery were "sentenced to be reduced to a matross." In that context, very plainly, matross was a rank, because when non-commissioned officers are punished by being eliminated from the service, they are dishonorably discharged or, in late XVIII Century usage, dismissed. The foregoing is entirely consistent with the definition of "matross" in the *Oxford Universal Dictionary* as "A soldier next in rank below the gunner in a train of artillery, who acted as a kind of assistant or mate."

(ii) The earliest American statutes similarly list artillerymen as soldiers and not as civilians. The Militia Act of May 8, 1792, c. 33, 1 Stat. 271, lists gunners, bombardiers and matrosses as enlisted men of artillery. The Act of May 9, 1794, c. 24, 1 Stat. 366, which established the Corps of Artillerists and Engineers, provided for "artificers to serve as privates." The Act of April 27, 1798, c. 33, 1 Stat. 552, authorizing an additional regiment of artillerists and

engineers, speaks of "sappers, miners, musicians and artificers to serve as privates." No later Act for organizing the military forces, and there are many, even faintly suggests that artillerymen are civilians.

(iii) Other contemporary records establish the military character of the American artillery. Thus, on August 18, 1792, General Wayne directed that "Captain Moses Parker will take charge and command of the artillery-armourers and artillery artificers." Wayne Orderly Book, MS., Hist. Soc. Pa., Phila.¹

On November 8, 1792, duties are ordered for "A Detachment of Artificers from the Legion consisting of 60 non Commissioned Officers and Privates." 34 Mich. Pion. & Hist. Coll. 400. And on Sept. 28, 1794, General Wayne disapproved a sentence of 50 lashes "passed upon a warrant officer," viz., the Master Armourer. *Id.* 556.

See also, with reference to armourers, pp. 42 and 43 below.

(iv) One of the earliest entries in 1 *Orderly Book of the Corps of Artillerists and Engineers* (MS., U.S.M.A.), which begins with May 7, 1795, lists the strength of the garrison as follows (p. 8): 1 captain, 4 lieutenants, 1 sergeant-major, 3 cadets, 4 sergeants, 6 corporals, 9 artificers, 4 musicians, and 67 matrosses. That is to say, a matross was a private of artillery.

It is thus plain that American artillerists were soldiers and not civilians.

(There may have been some artificers who were civilians, in addition to the artificers whose military status is plainly established; see the discussion below, at pp. 41-43.)

¹ The transcription of this entry appearing at 34 Mich. Pion. & Hist. Coll. 363 is inaccurate.

7. *It is necessary to distinguish British precedents that cannot accurately serve as analogies.*

At this juncture we incorporate by reference the discussion in the Singleton brief in No. 22 at pp. 70-72, which explains why British Articles of War for the royal forces overseas are not precedents in the present situation, inasmuch as Parliament did not undertake to regulate the Army outside the realm until 1803-1813.

8. *It is necessary to distinguish naval precedents which frequently rest on a different basis from military ones.*

Naval precedents are not very illuminating in the present connection.

(a) Despite the doctrine that every ship is to be deemed, at least to some extent, an extension of the national soil (*Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 123), it is not the fact that (Pet. Br., No. 21, p. 54, n. 36) "Since 1800, murders committed outside the United States by persons connected with that branch of the armed services which was most frequently outside the United States—the Navy—have been subject to trial by court-martial." That jurisdiction extended only to persons belonging to a public vessel of the United States, as *Rosborough v. Rossell*, 150 F. 2d 809 (C.A. 1), unhappily taught; it did not extend to every enlisted man in the Navy. Not until 1945 was the jurisdiction widened to the extent asserted by the Government in the foregoing quotation. Act of Dec. 4, 1945, c. 554, 59 Stat. 595, amending AGN 6.

(b) Until very recently indeed the Navy had no jurisdiction even over accompanying civilians in time of war in the actual zone of war; see *Hammond v. Squier*, 51 F. Supp. 227 (W.D. Wash.). Thereafter the Navy was given such jurisdiction, limited however to time of "war or national emergency." Act of Mar. 22, 1943, c. 18, 57 Stat. 41; 34

U.S.C. [1946 ed.] §1201. Earlier, in 1937, the Judge Advocate General of the Navy ruled that the Commandant of the leased U.S. Navy Base at Guantanamo Bay in Cuba had no jurisdiction whatever to try by court-martial civilians living there. Court-Martial Order 11 of 1937, p. 18.

(c) The citation (Pet. Br., No. 21, p. 62) of the cases of the Navy's paymasters' clerks (*Ex parte Reed*, 100 U.S. 13; *Johnson v. Sayre*, 148 U.S. 109; *McGlensy v. Van Franken*, 163 U.S. 694) is actually wide of the mark.

The Articles for the Government of the Navy there considered (R.S. §1624) contained no provision comparable to the contemporaneous Army camp-follower provision (AW 63 of 1874, in R.S. §1342), nor indeed any other provision whatever that purported to subject civilians to trial by court-martial.

This Court's holding, therefore, was, not that naval courts-martial could try civilians, but that, since a paymaster's clerk in the Navy had already been held to be an officer for some purposes (*United States v. Hendee*, 124 U.S. 309), he was (148 U.S. at 117) "a person in the naval service of the United States"—and as such subject to naval jurisdiction.

Inasmuch as it is not for a moment suggested that Guagliardo (of No. 21), or this petitioner, or Grisham (of No. 58) are in any sense "persons in the military service of the United States," it follows that the cases involving the former paymasters' clerks of the Navy are completely inapposite in the present connection.

(d) Finally (Pet. Br., No. 21, p. 54, note 36), it is sought to bolster the argument in support of the jurisdiction by referring to a popular history of the United States Coast Guard "for examples of public vessels manned by civilian seamen in 1800."

If the attempt there is, by inference from the foregoing, to suggest that the Coast Guard—known prior to 1915 as the U.S. Revenue Cutter Service—exercised court-martial jurisdiction over those civilian crews, then the suggestion is completely misleading. For the fact is that the Revenue Cutter Service, for well over a century, from 1790 when it was founded (§§62-64, Act of Aug. 4, 1790, c. 35, 1 Stat. 145, 175) until 1906 (Act of May 26, 1906, c. 2556, 34 Stat. 200), not only had no courts-martial of any kind, but was without any legal means of enforcing discipline on its ships. See Sen. Rep. 958 and H.R. Rep. 2749, both 59th Cong., 1st sess.

We say, therefore, that any blue-water precedents must be used with extreme care.

Having drawn attention to some basic distinctions that must be made in the evaluation of the historical materials, we now proceed to set forth all of the historical evidence bearing on the present issue that we have found.

B. *The only known English ruling from the XVIII Century held that there was no military jurisdiction over accompanying civilians in time of peace.*

In the course of his famous judgment in *Mostyn v. Fabrigas*, 1 Cowp. 161 (1774), Lord Mansfield, C.J., said (pp. 175-176):

"I remember, early in my time, being counsel in an action brought by a carpenter in the train of Artillery, against Governor Sabine, who was Governor of Gibraltar, and who had barely confirmed the sentence of a court-martial, by which the plaintiff had been tried, and sentenced to be whipped. The Governor was very ably defended, but nobody ever thought that the action

would not lie; and it having been proved at the trial, that the tradesmen who followed the train, were not liable to martial law; the Court were of that opinion, and the jury accordingly found the defendant guilty of trespass, as having had a share in the sentence; and gave 500*l* damages."

Now, very plainly, the foregoing is the recollection of a trial by a participant therein; but we submit that even the professional reminiscences of a Lord Mansfield are apt to portray far more accurately the law of his time in action than the forced inferences now sought to be drawn, nearly two centuries later, from the bare bones of the statute book (Pet. Br., No. 21, pp. 29-32). In any event, Lord Mansfield demolishes the suggestion (*id.*, p. 53) that courts-martial in Gibraltar had power to punish civilians for offenses otherwise cognizable in the civil courts.

Lord Mansfield's conclusions are moreover in accord with those set forth in Clode, *The Administration of Military and Martial Law* (2d ed. 1874) 94, 95 (quoted in the *Singleton* brief in No. 22), and show that the passage from Samuel, *Historical Account of the British Army and of the Law Military* that is quoted at Pet. Br., No. 21, pp. 31-32, plainly had reference to the wartime situation "in the field."

Reference is also made to the Act of 5 Geo. III, c. 33, likewise quoted in the *Singleton* brief, by the terms of which British military commanders in North America were directed to send civilian offenders in the wilderness to the nearest settled colony for trial. See pp. 72-74 of that brief.

The foregoing authorities establish that the assertion (Pet. Br., No. 21, p. 33) "that provision by the legislature for the trial by court-martial of persons 'in civil life'

was not repugnant to the English concept of liberty at the time of, and preceding, the American Revolution" has only the merit of hopefulness. The cited authorities show that the quoted assertion is simply not so.

C. *The many military trials of civilians by the Continental Army during the Revolutionary War do not support the peacetime military jurisdiction now asserted.*

We have listed in Appendix A the cases of 78 civilians of whose trials by court-martial we have found mention in Washington's General Orders over an eight year period, from 1775 to 1785. (We may note that the Government cited only 18.)

Part I of Appendix A lists the civilian employees so tried. Since every one of those trials took place in the Continental Army, in time of war, and "in the field," it is plain that those instances add nothing to what we have always conceded, viz., that civilians with the forces at such a time and place are subject to military law. Those examples do not, however, lend any support to the Government's attempt to erase the "in the field" limitation, in part by assertion (Pet. Br., No. 21, pp. 52-61), and in part by avoiding mention of the many official rulings which insisted on that limitation.

Part II of Appendix A lists the civilians tried by Continental Army courts-martial who were not employees of that Army. (We cite 35, as against a mere two listed by the Government.)

Some of those in the second group were spies, who as offenders against the law of war have traditionally been triable by the military regardless of their status otherwise. See *Ex parte Quirin*, 317 U.S. 1. The balance were inhabi-

tants, tried not under the Articles of War, but pursuant to a resolve of Congress that denounced aiding the enemy. In a sense, this too was a jurisdiction to punish breaches of the laws of war.

That analysis does not involve reading into an Eighteenth Century practice concepts not fully developed until the Twentieth; Washington himself pointed out the distinction in a contemporary letter written on Feb. 14, 1778 (10 *Writings of Washington* 458,459):

"There are, however, some mistakes in the present proceedings, which it will be necessary to rectify in the next. Joseph Rhoad and Windle Myer, being inhabitants, are not triable on the Articles of War, but must be tried on a special resolution of Congress passed the 8th of October last and extended by another of December 29th, which are inclosed for the Government of the Court."

For the resolutions in question, see 9 J. Cont. Cong. 784 and 1068.

Similarly, Washington wrote Gen. Smallwood on May 19, 1778 (11 *Writings of Washington* 420):

"In those cases, where it is a crime, if the criminal is an inhabitant, we have no law, subjecting him to the jurisdiction of a court martial, but he must be referred to the civil power, to be tried for treason. There is a resolve of Congress, empowering Courts Martial to take cognizance of inhabitants who have any communication of Trade or intelligence with the enemy, or who serve them in the capacity of guides or pilots; but the operation of this law is limited to persons taken within thirty miles of Head Quarters; which prevents its application to the present case."

Otherwise stated, this was an "in the field" jurisdiction even as to non-accompanying civilians. For, as Washington had written Governor Livingston of New Jersey on April 15, 1778 (11 *id.* 262),

"I am not fully satisfied of the legality of trying an inhabitant of any State by Military Law, where the Civil authority of that State has made provision for the punishment of persons taking Arms with the Enemy."

And, on April 9, 1779, Washington ordered a spy to be delivered up to civil authority. 14 *id.* 357.

But, while Washington was thus sensitive to the boundary between the civil and the military jurisdiction, some at least of the trials listed in Appendix A would plainly not pass muster today; see Nos. 9, 20, and 39, where the civilian official, being described as "late" Commissary, etc., appears to have left the service. Cf. *Toth v. Quarles*, 350 U.S. 11.²

Nor is it clear how and to what extent all of the trials of inhabitants noted would fare under the tests for war-time military jurisdiction of, respectively, *Ex parte Milligan*, 4 Wall. 2; *Ex parte Quirin*, 317 U.S. 1; and *Duncan v. Kahanamoku*, 327 U.S. 304.

But it is not necessary to pursue that speculation. It is sufficient that none of the trials of civilians by Continental court-martial during the Revolutionary War even faintly support the jurisdiction now asserted.

² In 1779 (15 *Writings of Washington* 108-109) the trial of an officer who had resigned was ordered. It does not appear whether the resignation had merely been tendered or whether it had actually been accepted; the context suggests the former.

D. *Military trials of civilians in the 1790s, at a time when there was endemic conflict between the military and civilian authorities, reflect primarily illegal assertions of military power and do not establish any authoritatively settled practice, such as the Government now urges, of exercising military jurisdiction only over civilians actually with the army in areas where there is no civil jurisdiction.**

In Appendix B, we list 40 instances of civilians or possible civilians tried by court-martial or punished by the military, between January 1793 and November 1798, a number of which are still recorded only in manuscript.

As will be pointed out immediately below, these trials can be classified in four groups, one plainly legal; two, equally plainly illegal; and only a fourth group that falls even arguably within the limits now advanced by the Government, viz., military trials of civilians accompanying the army in peacetime in an area where there is no civil jurisdiction.

Yet none of these trials appear to have been approved by higher authority, whether civil or military, and therefore, particularly since this period witnessed continuous friction between the civil authorities and the army over the scope of the latter's authority, none of these instances can be regarded as covering with a mantle of constitutional legitimacy the precisely defined military jurisdiction now sought to be sustained.

1. *The trials from 1793 to 1798 divided into categories.*

Four categories immediately suggest themselves:

(a) The first is the "in the field" jurisdiction over civilians, the trial by court-martial of a civilian with the army

* It is requested that Appendix D, *infra*, pp. 128 *et seq.*, be read before proceeding with this section.

at a time and in a place where military operations are being carried on. This jurisdiction is plainly legal; see Art. 2(10), UCMJ, and particularly the discussion at pp. 28-33 of the *Singleton* brief in No. 22.

(b) The second is military jurisdiction over civilians accompanying the forces in time of peace but at a place distant from any civil courts. This is debatable ground in the present cases; the Government contends that it is legal, we show that it was consistently condemned in numerous official rulings that the Government ignores.

(c) The third is military jurisdiction over civilians accompanying the forces in time of peace but in places where the civil courts are functioning. That jurisdiction is condemned by the Sixth Amendment, and we do not understand the Government to support its legality anywhere in the United States.

(d) The fourth category is military jurisdiction over civilians not shown to be functionally connected with the Army in any way, but simply in the vicinity. Such trials are of course palpably illegal. For this was the kind of military jurisdiction over ordinary civilian offenders that the British Parliament in 1765 and thereafter had refused to exercise, and that the Continental Congress in 1787 had refused to extend, even temporarily, over this precise area. See the details in the *Singleton* brief in No. 22 at pp. 72-74 and 90-94.

The 40 instances noted in Appendix B may be divided as follows (cases are numbered as there stated).

(a) *In the field*. In this category may be placed the two trials of sutlers at Green Ville in July 1794 (Nos. 2 and 5), at a time when the campaign that culminated in the victory at Fallen Timbers was about to start. See Jacobs, *The Beginning of the U. S. Army, 1783-1812* (1947) 168-171.

Possibly this would include also the two trials of traders unconnected with the army, Nos. 3 and 4.

(b) *Peacetime, distant from civil jurisdiction.* Most of the rest of the trials of accompanying civilians while the Army was under Wayne's command might be included here; see Nos. 6-18, 23-25, 29. However, if it be considered that the state of potential hostilities did not terminate until the signing of the Greenville treaty with the Indians on August 3, 1795, then all but No. 29 must be regarded as having taken place "in the field."

Also, since Greenville was within the boundaries of the organized Northwest Territory, it might be urged that there was an existing civil jurisdiction; one would have to determine the extent to which Greenville was then a settled community.

It should be noted that the civilian status of at least nine of the foregoing (Nos. 7-15) cannot be deemed to have been established beyond question; see *infra*, pp. 41-43.

In any event, seven other trials (and one instance of punishment without trial) involved civilians not alleged to have been connected with the army (Nos. 19-22, 26-27, 30).

(c) *Peacetime, within civil jurisdiction.* Seven of these cases are listed: No. 1, at Legionville, within the Commonwealth of Pennsylvania; Nos. 30A and 31 at West Point, N.Y.; Nos. 32, 33, and 37 at Detroit; and No. 38, at Pittsburgh.

(i) Legionville was a few miles northwest of Pittsburgh; it is now in Harmony Township, Beaver County, Pa.; see map in Wildes, *Anthony Wayne* (1941) 361. Very plainly, it was in a settled area, and indeed Gen. Wayne had, in Pittsburgh and elsewhere, sharp conflicts with the civil authorities. Wildes, 378-379.

(ii) West Point was then only within Orange County, N.Y., and had been purchased in 1790 pursuant to authority granted by the Act of July 5, 1790, c. 26, 1 Stat. 129. Not until March 2, 1826, did New York cede exclusive jurisdiction to the United States. N.Y. Laws of 1826, c. 64, p. 46; see *United States v. Knapp*, Fed. Case No. 15,538 (S.D. N.Y.). New York's writ ran there; see *In the matter of Carlton*, 7 Cow. 741 (N.Y. 1827). (For the present jurisdictional posture, cf. *People v. Hillman*, 246 N.Y. 467, 159 N.E. 400.)

(iii) Detroit in 1797 had a sheriff and a full complement of civil magistrates. See 2 Quaife, ed., *The John Astin Papers* (1931) 112-114. And Gen. Wilkinson was sued and had difficulties because he did not observe the boundary between civil and military authority. 2 *id.* 165, note 66.

(iv) *A fortiori*, Pittsburgh in 1798 (No. 38) had a settled system of civil courts.

(d) *Peacetime, over civilians unconnected with the Army*. At least 15 of the civilians tried by court-martial or otherwise punished by the military in the 1790s are not shown to have been connected with the Army in any degree. This group comprises the following: Under Gen. Wayne, two traders (Nos. 3 and 4), and seven others (Nos. 19-22, 26-28), among whom was a former soldier (No. 19). It includes Polly Toomy, flogged without trial at West Point in 1795 (No. 30A) and "Betts the Whiskey Smuggler" drummed out of camp by Gen. Wilkinson's order in 1796 (No. 30). And it includes the following tried by court-martial *tempore* Wilkinson, viz., a merchant and two civilians at Detroit (Nos. 34-36), and the Spaniard in Mississippi Territory in 1798 (No. 39).

We believe it is not possible to establish the legitimacy of this last group of trials on any basis.

2. *The foregoing trials establish, not a settled legal practice, but simply show the nature of and reason for the conflict between military officers and civil officials that characterized the American frontier in the 1790s.*

The trials here in question, far from reflecting a settled jurisdiction, affirm rather the timelessness of this Court's observation in *Inland Waterways Corp. v. Young*, 309 U.S. 517, 524, that "Illegitimacy cannot attain legitimacy through practice."

Leonard White in his administrative history of the first three presidential terms has shown how endemic conflict between civil and military officials dogged the early years of territorial government. See "Government in the Wilderness" in *The Federalists* (1948) 366-386. Many examples document that conflict as it touched military jurisdiction over civilians.

(a) As early as August 15, 1791, Judge Symmes of the Northwest Territory was explaining that Governor St. Clair was "putting part of the town of Cincinnati under military government. Nor do the people find their subordination to martial law a very pleasant situation. * * * There are, indeed, many other acts of a despotic complexion, such as some of the officers * * * while General Harmar commanded, beating and imprisoning citizens at their pleasure." Bond, ed., *The Correspondence of John Cleves Symmes* (1929) 148-149.

Another complaint from the same source is dated January 25, 1792 (*id.* 161):

"The superiority which the Governor affected to give the military over citizens, is maintained with ridiculous importance by some of the officers. I will give you one instance: Capt. Armstrong, commanding at Fort

Hamilton, ordered out some settlers and] threatens to dislodge them with a party of soldiers if he is not obeyed. The citizens have applied to me for advice, and I have directed them to pay no regard to his menaces, yet I very much fear he will put his threats in execution; for I well know his imperious disposition. This same Armstrong, soon after the Governor had ordered Knowles Shaw's house burned, and himself and family banished, met with Mr. Martin, the deputy sheriff, with whom, a little before, he had some dispute touching the superiority of the civil or military authority. Armstrong now deridingly takes the sheriff by the sleeve, saying: 'What think you of the civil authority now?' "

Judge Symmes shortly received assurances that such performances would cease. Secretary of State Jefferson wrote him on June 22, 1792 to say (2 Terr. Pap. of the U.S. 401),

"[The President] has permitted me to inform you that explicit orders are given to the Military in the North western territory to consider themselves as subordinate to the civil power on every occasion where the civil has legal authority to interfere, and this I believe may be counted on for observance."

(b) In 1792, Ensign W. H. Harrison (later the 9th President) was sued by two Army artificers for stripes inflicted by his direction under Gen. Wilkinson's order. Judge Symmes was of opinion that "the artificers of an army are subject to martial law," but that the question "an artificer, or no artificer" was for the civil courts to determine. 2 Terr. Pap. of the U.S. 400, 402.

As nearly as can be determined at this distance, there were military artificers as well as civilian artificers at this

period, so that it is not at all clear that the individuals who sued Ensign Harrison were civilians.

(i) *Military status.* In Sec. 7 of the Act of March 5, 1792, c. 9, 1 Stat. 241, 242, there is a reference to "artificers included as privates." Similarly, in Sec. 3 of the Act of May 9, 1794, c. 24, 1 Stat. 366, provision is made for "ten artificers to serve as privates." In later military legislation, through at least 1802, artificers constantly appear as military individuals. See also the references to artificers in the Orderly Books of General Wayne and of the Corps of Artillerists and Engineers, quoted *supra*, p. 28.

Similarly, with respect to a category closely allied to the artificer, the Wayne Orderly Book for March 27, 1795 (34 Mich. Pion. & Hist. Coll. 593) records the following trial, announced from Head Quarters Green Ville:

"At a General Court Martial whereof Major Buell is President, William Crocker, an Armourer in the Service of the United States, and James Scott a Fifer in the 4th Sub Legion, were tried upon the charges respectively exhibited against them, found Guilty, and ordered to receive One hundred lashes each, but recommended by the Court to Mercy—

"The Commander in Chief Pardons them Accordingly, and Orders them to be immediately liberated and to join the companies to which they belong—"

Here, it would seem, the armourer was a soldier. Compare the entry quoted *supra*, p. 28, where the Master Armourer is referred to as a warrant officer.

(ii) *Civilian status.* The early entry in 1 *Orderly Book of the Corps of Artillerists and Engineers* 8, quoted *supra*, p. 28, lists artificers as military members of the garrison. A later order in the same year (1 *id.* 151) speaks of "No

Artificer not belonging to the Regiment * * *." Such persons, it is fair to assume, were civilians.

(iii) *Questionable status.* In the 1776-1786 Articles of War in force during the period in question, Art. 23 of Sec. XIII was the provision regarding accompanying civilians, while Art. 5 of Sec. XVIII was the general article.³ The latter referred only to "officers and soldiers," while the civilian provision was by its terms applicable to certain classes of civilians "though no inlisted soldier."

If the court-martial order, therefore, mentions Art. 23 of Sec. XIII, with or without a further mention of Art. 5, Sec. XVIII, it is fair to assume that the accused is "no inlisted soldier," unless of course his description, as, e.g., a sutler, plainly shows him to be a civilian. Contrariwise, failure to refer to Art. 23 of Sec. XIII may be taken in equivocal cases to reflect a military rather than a civilian status on the part of the person on trial.

On that footing the individuals tried in cases 7-15 inclusive may well not have been civilians, a view confirmed by the fact that William Crocker, Armourer, No. 10, appears to be the same individual who in the entry for March 27, 1795, quoted above, p. 42, seemed clearly to be a soldier rather than a civilian.

The results of trial in all nine cases, five of the accused being designated as armourers, the other four as artificers, were announced in the same order of Jan. 31, 1795 (34 Mich. Pion. & Hist. Coll. 583-584).

The question of these nine individuals' civilian status can, therefore, only be answered with the Scotch verdict, Not proven.

³ Later AW 99 of 1806; AW 62 of 1874; AW 96 of 1916 through 1948; Art. 134, UCMJ.

(c) Meanwhile, at Pittsburgh, where he had arrived by July 1792, Gen. Wayne was becoming embroiled with civil authorities also. Wildes, *Anthony Wayne*, 378-379. By December, he had moved the troops to Legionville, still within the Commonwealth, and there, on December 9, 1792, he issued the following order (*Wayne Orderly Book*, MS., Hist. Soc. Pa., Phila.):

"It having been represented to the Commander in Chief,¹ that the market has been forestalled; and high and exorbitant prices Demanded & given for a variety of Articles, far beyond any price heretofore known in this Country from the thoughtless conduct of Individuals. * * * it becomes necessary that there should be an Officer of Police to Superintend & regulate the Market; and whilst he Allows a generous price for the produce brought to this place (except whiskey; which is hereby Prohibited from being Sold, bartered or furnished the Soldiery either directly or indirectly by Merchants traders or Others) he will at the Same time protect the inhabitants from injury and insult; and Guard against exorbitancy and forestallment.—

"Captain Porter will perform this Duty and make the necessary Arrangements & Regulations. * * *

It goes without saying that, when a military commander has such a distortedly inflated view of his powers over the civilian economy in a State of the Union in time of peace, one cannot take too seriously his jurisdictional practices in respect of trying civilians by court-martial.

(d) At Detroit in July 1797, Gen. Wilkinson issued an order aimed at civilians who sold liquor to soldiers and who persuaded them to desert; *Wilkinson Order Book* (MS.,

¹ I.e., Wayne, who normally signed himself "Major General and Commander in Chief of the Legion of the United States."

Nat. Archives) 48, quoted in full below; see page 114, note 3.

Now, very plainly, Wilkinson had no power to direct civilians in a community where magistrates and a sheriff were functioning to do anything; his authority was limited to his own troops. Moreover, enticing a soldier to desert had been made a civil offense by Congress in the preceding year, see Sec. 15 of the Act of May 30, 1796, c. 39, 1 Stat. 483, 485, and punishable with a maximum penalty of a \$300 fine *or* one year's imprisonment. Yet Wilkinson approved, for precisely the same offense, a particularly vicious sentence passed on a civilian inhabitant by a court-martial, that condemned him, among other indignities, to shaving of the head and eyebrows and fifty lashes with a wired cat-of-nine-tails (No. 35).

Obviously, then, his three trials of citizens at Detroit (Nos. 34-36) were palpably illegal on any basis; while those of the sutlers (Nos. 32, 37) and of the woman of the camp (No. 33), there being civil authority present, were likewise unlawful although perhaps less strikingly so.

Notice has already been taken of the conflict evoked by this assertion of power, *supra*, p. 39; and in 1799 the commanding officer at Detroit had again to be reminded by higher authority of "the error * * * in proclaiming military law, and threatening the inhabitants with punishment by court-martial." 3 Terr. Pap. of the U.S. 20-21.

Wilkinson's trial of a follower at Pittsburgh in 1798 (No. 38) stands on no better footing.

His last recorded trial of a civilian, a Spanish subject, took place in November 1798 at Loftus's Heights, Mississippi Territory (No. 39), now Fort Adams, Wilkinson Co., Miss., in the southwestern part of that state.

By that time the Mississippi Territory had been organized (Act of April 7, 1798, c. 28, 1 Stat. 549), and Winthrop Sargent had been commissioned Governor (5 Terr. Pap. of the U.S. 28-29) and had arrived in Natchez (*id.* 52, note 5). It may well be that no courts were yet functioning. But there is reason to believe that the accused was tried and his punishment remitted primarily that Wilkinson might show the remission to the Spanish Governor at New Orleans and thus curry favor with his paymaster. Jacobs, *Tarnished Warrior: Major-General James Wilkinson* (1938) 183 (transmission of order to Gayoso), 271-273 (proof in Spanish Archives of payments to Wilkinson).

(c) Little more can be said for the trial of the sutler at West Point in 1795 (No. 31).

Major Tousard, Commandant of the Garrison, the same who two months earlier had ordered Polly Toomy flogged without trial (No. 30A), on Sept. 26, 1795 issued a Standing Order (1 *Orderly Book of the Corps of Artillerists and Engineers* (MS, U.S.M.A.) 151):

"To all whom it may Concern

"Be it know, that deffense is expressly made to sell any Liquor to the Soldiers composing this Garrison * * * "

This was followed by the text of Sec. XIII, Art. 23, of the 1776 Articles of War, then still in force.

It can hardly be supposed that an officer who after nearly twenty years had been unable to absorb idiomatic English would be aware of the Anglo-American tradition of civilian supremacy or of the constitutional distinctions flowing from the circumstance that his post was within a State of the Union at a time and place of piping peace.

Major John Joseph Ulrich Rivardi, who approved the proceedings, was likewise a Frenchman by birth, whose first commission in

3. *The circumstances of these trials are not such as to establish their legitimacy.*

Wayne had been a surveyor and a tanner before he became a soldier (19 Dict. Am. Biog. 563); Wilkinson a doctor (Jacobs, *Tarnished Warrior* 3-7), Tousard had been a soldier when he came to America in 1777 as a volunteer (1 Heitman 966), and St. Clair had written Washington in 1789 (2 Terr. Pap. of the U.S. 204, 207). "The present Governor pretends not to a knowledge of the Law—" The sum total of these trials, therefore, does not add up to a consensus of lawyers' opinion as to the constitutional boundaries of military power.

Even contemporaries questioned the legality of some of the proceedings. Wilkinson himself wrote the Secretary of War on March 14, 1797 in these terms (*Memoirs of General Wilkinson*, 1810 ed., App. to vol. I, 173-174):

"I consider it my duty, in this place, to urge the appointment of a judge advocate, and to recommend lieutenant Smith to the office, as the individual of the army, best qualified for the station. After the ignorance, misrule and lawless proceedings, which I have witnessed in our military tribunals, I should be criminal were I silent on this occasion. In a community, where men are so frequently put upon trial for life and honor, and where we very often find their judges young men, strangers to every rule of practice in judiciary proceedings, and profoundly ignorant in all things: surely, every possible precaution should be

the United States Army dated from Feb. 26, 1795—little more than eight months previously. 1 Heitman 833.

⁶ This is a wholly different work from the 1816 edition published as *Memoirs of My Own Times*. The earlier work was never completed, and the volumes actually published are in the Rare Book Division of the Library of Congress.

interposed, to promote the lights of information and to preclude error; for, to the reproach of humanity, our military records bear testimony to several unjust sentences, and to one illegal execution of a private soldier. * * *

The appointment of a judge advocate had been authorized by Sec. 2 of the Act of March 3, 1797, c. 16, 1 Stat. 597, but Campbell Smith, by then a Captain, appears not to have been appointed to the office by the President until 1801. *Wilkinson Order Book* 321 (Apr. 9, 1801); 1 Heitman 894-895 (appointment as judge advocate, Apr. 1, 1801).

Yet—and here is a curious point—Lt. Campbell Smith's appointment as "Judge Martial and Advocate General to the Legion of the United States" is duly noted in the *Wayne Orderly Book* for July 16, 1794 (34 Mich. Pion. & Hist. Coll. 529), and he was able to persuade the Congress to allow him extra pay on the footing of the earlier appointment. 1 Am. St. Pap. Mil. Aff. 144-146; Act of March 29, 1800, c. 17, 6 Stat. 40.

It is true that some of the earliest court-martial proceedings still extant reflect patent irregularities. Thus, although AW 6 of 1786 clearly made provision for a judge

* See also the orders of Sept. 8 and 23, 1792, at Pittsburgh, appointing Lieut. Staats Morris "Deputy Judge Advocate General to the Legion of the United States," and directing that he "will always officiate as Judge Advocate at General Courts Martial." 34 Mich. Pion. & Hist. Coll. 379 and 385.

All War Department papers prior to 1801 were destroyed in a fire on the night of Nov. 8, 1800 (1 Am. St. Pap. Misc. 232, 603). Earlier court-martial orders appear in the order books of Gens. Wayne and Wilkinson and of the Corps of Artillerists, etc., at West Point. The only complete proceedings that record the testimony prior to 1808 of which we are aware are in the *Wayne MSS.*, Hist. Soc. Pa., Phila. The series in the National Archives (*Proceedings of Courts-Martial, War Office*) contain nothing earlier than 1808.

advocate, the West Point *Orderly Books of the Corps of Artillerists and Engineers* contain proceedings in which there was no judge advocate but only a "Recorder" (1 *id.* 93) or a "Judge Recorder" (2 *id.* 112), or where a cadet was "Acting Judge Advocate" (4 *id.*, Nov. 10, 1798).

And, whether or not Campbell Smith was Judge Martial to the Legion in the sense of being a legal adviser to its Commander, his ability to influence the imperious temper of Anthony Wayne may well be doubted. That officer's court-martial orders reflect, even by the standards of that day, a broad streak of consistent brutality.

Soldiers were frequently sentenced to be branded on the forehead (34 Mich. Pion. & Hist. Coll. 371, 381, 484), a practice at which the Secretary of War frowned and which the President questioned. See letters Wayne to Knox, Aug. 10 and Sept. 7, 1792, in 1 *Campaign Into the Wilderness: The Wayne-Knox-Pickering-McHenry Correspondence* (Knopf ed. 1955) 52, 81; Knox to Wayne, Sept. 14, 1792, 1 *id.* at 90; Washington to Sec. War., Aug. 26, 1792, 32 *Writings of Washington* 134, 135.*

Some of Wayne's sentiments simply mirrored the era. Thus, in confirming a death sentence for mutiny—later reprieved—he wrote on August 3, 1792, "A soldier who lifts his arm against his officer ought not to be permitted to live." 34 Mich. Pion. & Hist. Coll. 356. But on other occasions his confirmations in capital cases appear to exhibit an almost personal satisfaction:

* One of the most savage of such sentences was passed on a soldier convicted of stealing from the tent of Wayne's aide-de-camp: "to walk the Gantlett, through the Legion of the United States (slow step) Naked.—to have his head and eye brows shaved, to be branded on his forehead, and in the palms of both hands with the letter T and to be drummed out of Camp with a halter around his neck and dismissed the Service." *Wayne Orderly Book*, Head Quarters Legion Ville, Feb. 17, 1793 (MS., Hist. Soc. Pa., Phila.).

"The Reverend Doctor Jones will attend and prepare these unhappy Men, for the great change they are shortly to experience." Nov. 27, 1794, 34 *id.* 571.

"The Reverend Doctor Jones, will attend at the Provost, and prepare the Minds of these unfortunate Men, * * * for the awful Moment of their exit from this transitory World." July 2, 1795, 34 *id.* 624 (later pardoned on Aug. 29, *id.* 640).

A similar harshness had attended Gen. Wayne's suppression of the mutiny in the Pennsylvania Line in 1783. Wildes, *Anthony Wayne*, 242-245.¹⁰

4. *None of the foregoing trials were ever approved by higher civil authority, but were contrary to policies formulated by civil authority.*

There is no indication whatever that any of the military trials of civilians discussed above were ever approved by, much less submitted to, higher civil authority. If they had been, then we would at least be vouchsafed an authoritative contemporaneous interpretation of military law.

¹⁰ In Wildes, 378, it is said, "When Ensign William T. Payne was caught weeping at the sight of a deserter's being executed [Sgt. Trotter, per order of Nov. 11, 1792, at Pittsburgh]; the boy was charged with drunkenness and was forced out of the army." But the actual proceedings (49 Wayne MSS., Nos. 51-54, Hist. Soc. Pa.) hardly support this stricture. The accused in his defense said, "my mind affected with melancholy reflection on human fatality (although at the same time I approved both the sentence and the execution) this might account for my shedding tears without being supposed intoxicated." There was considerable testimony that Payne was drunk. And certainly no degree of melancholy would account for his falling over the late deserter's corpse, a fact that was established by the evidence. The accusation therefore cannot be regarded as a concocted subterfuge.

The court sentenced Payne to dismissal, with a recommendation for clemency "so far as to receive his resignation without publishing his disgrace"; and Gen. Wayne permitted him to resign accordingly, by order of Nov. 17, 1792. 34 Mich. Pion. & Hist. Coll. 405.

such as exists in the approval by President Madison of Gen. William Hull's trial by court-martial in 1814 where the accused was denied the assistance of counsel despite his invocation of the Sixth Amendment. See references collected in 72 Harv. L. Rev. 29-31, and commentary, *id.* 42-49.

Certainly Washington's letter to the Secretary of War in September 1792, referring to neglects on the road between Philadelphia and Pittsburgh within the Commonwealth of Pennsylvania, cannot be construed as a direction to try the offenders by court-martial.¹¹

The fact is that, in the area now being considered, every expression from higher authority points to a disapproval of the exercises of military jurisdiction that have just been reviewed at such length. Here are two letters from President Washington, written at the time of the Whiskey Rebellion; the first is to Governor Lee of Virginia, then in command of the militia, dated Oct. 20, 1794. Washington wrote (34 *Writings* 6):

"There is but one point on which I think it proper to add a special recommendation. It is this, that every officer and soldier will constantly bear in mind that he comes to support the laws and that it would be peculiarly unbecoming in him to be in any way the infractor of them; that the essential principles of a free government confine the provinces of the Military to these two objects: 1st: to combat and subdue all who may be found in arms in opposition to the National will and authority; 2dly to aid and support the civil Magistrate in bringing offenders to justice.

¹¹ "The conduct of the Waggoners, in dropping the public stores with the transportation of which they are charged, along the Road to Pittsburgh, ought to undergo the strictest scrutiny; and in cases of culpability, to meet with severe punishment by way of example to others." 32 *Writings of Washington* 139.

The dispensation of this justice belongs to the civil Magistrate and let it ever be our pride and our glory to leave the sacred deposit there unviolated”

The President restated the same views to Gen. Morgan on March 27, 1795 (34 *Writings* 159-160):

“Still it may be proper constantly and strongly to impress upon the Army that they are mere agents of Civil power: that out of Camp, they have no other authority, than other citizens [,] that offences against the laws are to be examined, not by a military officer, but by a Magistrate; that they are not exempt from arrests and indictments for violations of the law; that officers ought to be careful, not to give orders, which may lead the agents into infractions of the law; that no compulsion be used towards the inhabitants in the traffic, carried on between them and by the army: that disputes be avoided, as much as possible, and be adjusted as quickly as may be, without urging them to an extreme: and that the whole country is not to be considered as within the limits of the camp.”

That is to say, while the armed force of the Nation was actually arrayed against the insurrectionists in Western Pennsylvania, Washington was denouncing the very excesses that Wayne had committed in substantially the same area a few years earlier, at a time when all was peaceful.

It should also be noted that there is no evidence whatever that the trials now under consideration ever came to the attention of the Congress.

Indeed, there is ample evidence on the statute book that Congress during this period was somewhat less than eager to face up to the problem of conforming the Continental Articles of War to the new Constitution.

General Knox, last Secretary at War under the Confederation and first Secretary of War thereafter, immediately recognized in August 1789 "that the change in the Government of the United States will require that the articles of war be revised and adapted to the constitution" (1 Am. St. Pap. Mil. Aff. 6). Washington transmitted his recommendations for a small peacetime Army to the Senate, remarking "that the establishment thereof should in all respects, be conformed by law, to the Constitution of the United States" (30 *Writings of Washington* 376). But Congress for many years was quite unwilling to undertake the necessary labor of revising, adapting, and conforming.

On no less than three occasions in the 1790's, Congress simply reenacted the Continental Articles of War with a generalized qualification, "as far as the same may be applicable to the constitution of the United States" (Sec. 13 of the Act of Apr. 30, 1790, c. 10, 1 Stat. 119, 121; Sec. 14 of the Act of Mar. 3, 1795, c. 44, 1 Stat. 430, 432; Sec. 20 of the Act of May 30, 1796, c. 39, 1 Stat. 483, 486). On a fourth occasion, the Continental Articles for the Government of the Navy were similarly reenacted (Sec. 8 of the Act of July 1, 1797, c. 7, 1 Stat. 523, 525). Here was a blanket proviso, telling the reader everything—and nothing—except, inferentially, that Congress was more than prepared to postpone to a future day the expression of constitutional opinions in this area.

And it is a fact that the revision of the Articles of War that Secretary Knox had indicated to be necessary in 1789 was not in fact effectuated until 1806, and then only after many delays. See, for the legislative history, 72 Harv. L. Rev. at 15-22.

Accordingly, the legislative materials fail to show acquiescence in, much less ratification of, the military trials of civilians that we show took place in the 1790's.

5. *The foregoing trials are not a safe guide to constitutional interpretation, and therefore do not support the military jurisdiction now asserted.*

Even at the risk of repetition, we deem it proper to point out that of the foregoing trials, those at West Point, at Pittsburgh, and at Detroit were palpably, indeed flagrantly, illegal, since the civil courts were open and functioning.

Some of the wilderness trials were very obviously in the field; the others may present borderline cases. But it must always be borne in mind that Major General Anthony Wayne, doughty Indian fighter that he was, is not to be regarded as a constitutionalist.

The Republic must ever be grateful to him for (literally) whipping the Legion into such form that it could win the smashing triumph over the Indians at Fallen Timbers that made the Old North West actually and not merely nominally American.

There is no occasion now to consider whether or not great fighters are also great men. It is sufficient here merely to observe that it would be badly misreading the troubled time of the 1790's to suggest that Anthony Wayne's actions can furnish guidance in settling the boundaries of military power. He did so much that was obviously illegal that the simple fact of his having acted as he did—the mere historical precedent—cannot possibly serve as a constitutional precedent, least of all since what he did ran counter to the views expressed by the President in the same area, and was never shown to have been brought to the attention of, much less approved by, the Congress.

Moreover, as we point out in Appendix D, pp. 128 *et seq.*, *infra*, in the context of concepts then prevailing, these trials appear to have been regarded as having taken place in time of war.

E. *The peacetime military jurisdiction exercised over civilians from 1825 to 1860 was episodic, in the extreme and similarly reflected illegality rather than authoritative constitutional interpretation.*

The last trial of a civilian recorded in General Wilkinson's Order Book was on November 19, 1798 (No. 39); the last entry in that collection is dated April 23, 1808; the War Department series of recorded military trials (*Proceedings of Courts-Martial, War Office, MSS., Nat. Arch.*) begins then; but neither party has found any military trials of civilians between 1798 and 1827.

For the sake of completeness, two intervening items should be noticed.

(i) Isaac Maltby, a Brigadier General in the Massachusetts Militia but probably no lawyer,¹² published in 1813 *A Treatise on Courts Martial and Military Law*. At p. 31 of that work, citing only AW 60 of 1806, he says:

"In the regular army, all the individuals of which it is composed, whether officers or soldiers, are amenable to courts martial; also all persons attached to the army, and all persons serving with, or doing business for the army."

Literally, of course, this would include dependents on a post in a settled area of the United States as well as contractors with the army; as a correct statement of constitutional law, therefore, the expression cannot be taken too seriously.

(ii) In the *General Regulations for the Army* of 1825, revised by General Scott, Article 341, dealing with sutlers, states:

¹² The only reference we have found concerning him shows only that he was a graduate of Yale College. Wells and Wells, *A History of Hatfield, Massachusetts* (1910) 254.

"341. Every sutler shall hold his appointment during the pleasure of the Secretary of War; but besides his amenability under the 60th article of war, he may be suspended from the privilege of suttling by the commander of the post, on the recommendation of the council of administration, till the orders of the Secretary of War be received in the case."

Here again, AW 60 of 1806 was read broadly, which may account for the seven trials cited by the Government (Pet. Br., No. 21, p. 56, note 37).

1. *William Armistead*, Sutler at Fortress Monroe (No. C 68, MS., Nat. Arch.), April 1825.

The accused was charged with (1) Mutiny and Violation of Duty and (2) Conduct subversive of good order and discipline, in detaining two Negroes bringing shoes into the post by order of the Chief Engineer. A plea to the jurisdiction was rejected, after which the trial resulted in Armistead being "honorably acquitted."

2. *Jabez Burchard*, Sutler at Fort Washington, Md. (No. V 15, MS., Nat. Arch.), December 1825.

A plea to the jurisdiction was overruled on the authority of Art. 341, Gen. Regs. of 1825 (*supra*).

The accuser, Lt. Childs, was a member of the court, but a challenge on that basis was overruled, and this officer duly testified for the prosecution, the charge being that the accused sent him "a highly disrespectful note."¹³

Burchard was found guilty and sentenced to be dismissed as a sutler, the court recommending reinstatement "in consideration of his former correct deportment."

¹³ Under AW 4 of 1916 through 1948 and under Art. 25(d)(2), UCMJ, an officer who is the accuser or a witness for the prosecution is not eligible to be a member of the court.

3. *William O. West*, Sutler to Cos. E & K, 7th Inf., tried by regimental court-martial at Fort Gibson (No. BB, 149, MS., Nat. Arch.), August 1833. Fort Gibson was in Indian Territory (2 Heitman 502); it is now the site of the city of the same name in Muskogee Co., Oklahoma.

The court was appointed by Col. Arbuckle, who was a witness for the prosecution, and therefore an accuser. (Had this been a general rather than a regimental court-martial, it could not, in view of the Act of May 29, 1830, c. 13, 4 Stat. 417, have been appointed by an accuser.)

West was charged with six specifications of disobedience of orders, *viz.*, selling whiskey to the troops, and found guilty on five; he was sentenced to be suspended from suttling until the pleasure of the "Secretary at War" be known. The court recommended the dismissal of one Flowers, the accused's partner, from further suttling, "as an unfit person to be about the garrison." The court also recommended "the dismissal from the Post, and its neighborhood" of three named "Laundresses of the 7th Infantry, it being the opinion of the Court, that they testified falsely, before it."

Col. Arbuckle, the convening authority, approved so much of the sentence as suspended the accused from suttling and directed the closing of his store, and ordered that portion carried into execution. He then added:

"The remainder of the sentence is disapproved of, as it is regarded as the exclusive duty of those authorized to constitute Courts Martials, to act definitely on their proceedings.

"The recommendations of the Court in relation to B. W. Flowers and others who were not on trial, however censurable their Conduct may have appeared by the testimony before the Court in the Case of W. O. West; it is unprecedented, and was a total

departure by the Court from its duties, and it is therefore disapproved, and regarded highly exceptionable."

4. *J. W. Wiese*, "a follower of the Army (Clerk to Dellam & Hambaugh, Army Sutlers)," tried at Fort Brooke, East Florida (No. CC 488, MS., Nat. Arch.), Sept. 1838. Fort Brooke was at the site of the present city of Tampa, Florida.

Wiese was charged with violation of general orders and the order of the Quartermaster's Dept., viz., 4 specifications of selling liquor to teamsters in the employ of the Quartermaster at Fort Brooke.

"The Court are of opinion that it has jurisdiction over the Case, but in consequence of the Prisoner being only a Clerk to the Sutler and not the responsible person, decide to proceed no further in the prosecution against him."

In Order No. 58, Hq. Army of the South, Fort Brooke, Sept. 17, 1838, Brig. Gen. Z. Taylor commanding (MS., Nat. Arch.), which announces the results of other cases tried by the same court, there is no mention of this case.

Whether Fort Brooke was "in the field" in the setting of the then subsisting Seminole War (cf. Upton, *The Military Policy of the United States* (1917 ed.) 185-186), whether the courts of the Territory of Florida established pursuant to the Act of March 30, 1822, c. 13, 3 Stat. 654 (cf. *American Insurance Co. v. Canter*, 1 Pet. 511) were actually functioning in that area, need not be determined.

All of the four trials of sutlers just enumerated took place when there were no lawyers whatever in the Army: The judge advocates provided for in Sec. 2 of the Act of April 14, 1818, c. 61, 3 Stat. 426, were dropped in the

reorganization effected by the Act of March 2, 1821, c. 13, 3 Stat. 615, and the office of Judge Advocate of the Army was not again established for 28 years more, by Sec. 4 of the Act of March 2, 1849, c. 83, 9 Stat. 351.

As is pointed out below, pp. 66-70, when the question of military jurisdiction over the post trader, successor to the sutler, was thereafter presented for a legal opinion, The Judge Advocate General held that such persons were not subject to court-martial except in the field in time of actual hostilities.

And, unless it is now contended that a similar jurisdiction may constitutionally be exercised over civilians at Fort Monroe, Virginia, or at Fort George G. Meade, Maryland, the first two instances cited show only that subordinate military commanders on occasion acted illegally. Indeed, all of these cases are curiosities rather than constitutional precedents.

It remains to consider the three trials of accompanying civilians in 1858 cited by the Government.

5. *James Trader*, "a citizen in the Quarter-Master's employ" (No. HH 882, MS., Nat. Arch.), tried at Camp Scott, Utah Terr., in February 1858.

The charge was conduct prejudicial to good order and military discipline, the specification stealing a pistol from the Ordnance Department.

Finding, Guilty; sentence, 6 months' confinement at hard labor, "wearing a ball and chain attached to his leg weighing twenty-five pounds."

The sentence was approved by the Department Commander, Col. Albert Sidney Johnston, and after three weeks the unexecuted portion thereof was remitted.

6. *William C. Barnard*, "an employee in the Quartermaster's Department" (No. HH 895, MS., Nat. Arch.), tried at Camp Scott, Utah Terr., in March 1858.

Same charge as the preceding, but the specification was that the accused stole a bar of steel from the Government blacksmith shop and sold it to a civilian storekeeper's clerk. Found guilty and sentenced to 20 days' confinement at hard labor; the unexecuted portion of the sentence was remitted after 16 days.

7. *Henry F. Ringsmer*, "a Retainer in the Army of the United States in the Field" (No. HH 880, MS., Nat. Arch.), tried at Camp Scott, Utah Terr.

Same charge; specification, larceny at Fort Bridger in January 1858 of brandy belonging to the Hospital Department, and possession of such stolen brandy.

Ringsmer had counsel, who objected to the jurisdiction: the judge advocate cited AW 60 and AW 99 of 1806; plea overruled; one member however objected, and put this proposition (p. 5):

"The Court entertain no doubt of their Competency as a judicial tribunal for the trial of the case of Mr. Ringsmer, yet as adjudication by a civil tribunal is within reach, they recommend that the prayer of the accused be granted, and that his case be referred for trial to the District Court of Green River County of the Territory of Utah at its next term."

On the next day, that proposition was withdrawn, and the objecting member submitted the following (p. 6):

"The court recommend that the prayer of the prisoner be granted, and that the case of Mr. Ringsmer be referred for trial to the civil tribunal of Green River County of the Territory of Utah."

This failed, and the jurisdiction was sustained.

The court-martial, however, refused to permit the judge-advocate either to impeach a prosecution witness by proof of his prior inconsistent statements, or to cross-examine a hostile prosecution witness, with the result that the accused was acquitted. The findings of not guilty were approved on Feb. 10, 1858.

Thus, in respect of these three cases, the argument in favor of the presently asserted jurisdiction is impaled on a dilemma:

Either the trials took place "in the field" in the context of the Mormon Campaign—see Rep. Sec. War, 1858 (Sen. Ex. Doc. 1, part 2, 35th Cong., 2d sess.), pp. 68, 28-223—or else civilians were tried by court-martial in an area where the civil courts were shown to be in operation. In fact, Utah had been an organized territory since 1850, with a full complement of courts. Sec. 9 of the Act of Sept. 9, 1850, c. 51, 9 Stat. 453, 455.

On neither possibility do the cases sustain the jurisdiction now asserted (Pet. Br., No. 21, p. 56), *viz.*, at "an organized camp in a remote place, where the civil law of the United States was not functioning or could be reached only with difficulty."

We may appropriately close the present heading with the 1859 enactment that purportedly subjected to the Articles of War, "in the same manner as soldiers in the Army," "all persons admitted into the Soldiers' Home." Sec. 7 of the Act of Mar. 3, 1859, c. 83, 11 Stat. 431, 434. This was carried into the Revised Statutes as 4824, into the Code as 24 U.S.C. §54, and reenacted as AW-2(f) of 1916 through 1948.

It was, of course, a jurisdiction patently unconstitutional as no one is eligible for entrance into the Soldiers' Home.

until after his—now also her—discharge from the service; and so The Judge Advocate General of the Army consistently held (Dig. Op. JAG, 1912, p. 1010, ¶1A).

F. *Extensions of military jurisdiction during the Civil War must be regarded with caution.*

Much that was done in the Civil War reflects only *inter arma silent leges* and cannot be seriously accepted as a guide to contemporaneous constitutional interpretation—a warning that must constantly be borne in mind in considering the arguments now advanced in favor of the presently contested military jurisdiction.

(a) It is said (Pet. Br., No. 21, p. 47) that “the constitutional term ‘land and naval Forces’ was not synonymous with ‘armed forces’ or ‘armed services,’” citing Cong. Globe, 37th Cong., 3d sess., pp. 995, *et seq.*

But this overlooks that the 37th Congress is a particularly unreliable guide to the proper scope of Clause 14.

It was the 37th Congress that purported to make contractors subject to trial by court-martial (Sec. 16 of the Act of July 17, 1862, c. 200, 12 Stat. 594, 596), an asserted jurisdiction promptly—and necessarily—held unconstitutional. *Ex parte Henderson*, Fed. Case No. 6349 (C.C.D. Ky.).

It was similarly the 37th Congress that purported to make persons separated from the armed forces subject to trial by court-martial for frauds against the Government, notwithstanding their return to civilian status. Sec. 2 of the Act of Mar. 2, 1863, c. 67, 12 Stat. 696, 697, later AW 60 of 1874; AW 94 of 1916 through 1948; Art. 3(a), UCMJ. The unconstitutionality of such a recapture provision was consistently asserted by Winthrop (*142-*146), and has now been established by *Toth v. Quarles*, 350 U.S. 11.

The 37th Congress had therefore better be politely ignored in the present connection.

(b) Reference is made to an opinion of Judge Advocate General Holt (Pet. Br., No. 21, pp. 56-57) rendered on Nov. 15, 1866, that does not mention the "in the field" limitation.

This "opinion" is primarily remarkable because it does not even mention the Constitution, nor does it contain the slightest suggestion that the trial of civilians by court-martial in time of peace involves a constitutional question, viz., the scope of Art. I, Sec. 8, Clause 14 on the one hand (with or without Clause 18), and the reach of the Sixth Amendment on the other.

Moreover, the Holt memorandum was written a month before the opinions in *Ex parte Milligan*, 4 Wall. 2; see 18 L. Ed. 291 for their date. There fore, since General Holt was the primary exponent of the policy of military control, through military trials, of political prisoners, see 9 Diet. Amer. Biog. 181, 182-183, his views as to the proper location of the boundary between the civil and the military jurisdiction hardly furnish safe guides today.

Holt was also the prosecutor at the Trial of the Lincoln Conspirators. That performance, although sought to be legally justified (11 Op. Atty. Gen. 215 [one sentence opinion]; 11 Op. Atty. Gen. 297), was bitterly assailed by competent contemporary critics as utterly illegal and completely unconstitutional. Beale, ed., *The Diary of Edward Bates* [Atty. Gen. in first Lincoln Administration] (H.R. Doc. 818, 71st Cong., 3d sess., vol. IV), pp. 481, 483, 498-503. No one since has ever even attempted to sustain that incarnation of anguished passion. Winthrop cites it a few times to illustrate incidental procedural points, but his silence as to its substance is deafening.

It may be noted that one's current impression of the illegality of those proceedings is notably enhanced by the circumstance that, when one of the conspirators obtained a writ of habeas corpus, the Government responded with an Executive Order that suspended the privilege of the writ. Pitman, *The Assassination of President Lincoln and the Trial of the Conspirators*, 250.

(c) In the Confederacy the courts took a narrow view of military jurisdiction. Thus, in 1864, one McKee was tried by court-martial at Alexandria, Louisiana, on charges of holding correspondence with and giving intelligence to the enemy, and of encouraging desertion, on the footing that he was a major and assistant quartermaster, C.S.A. The court-martial found that he had never been formally commissioned, amended the charge sheet to describe him as a person "under control of the military authorities governing said Quartermaster Department of the Confederate States in the Field west of the Mississippi River," found him guilty, and sentenced him to be shot.

Thus McKee was a civilian within the "in the field" limitation. None the less, the Confederate District Court for Louisiana, on habeas corpus, ordered him released. See Robinson, *Justice in Grey* (1941) 199-201, 152-153.

(d) This would be a convenient juncture to mention the enactment that in 1866 purported to subject the inmates of the National Asylum (later called Home) for Disabled Volunteer Soldiers to military law. Sec. 9 of the Act of Mar. 21, 1866, c. 21, 14 Stat. 10, 11. This provision, likewise, was carried into the Revised Statutes as §4835, into the Code as 24 U.S.C. 137, and was not repealed until 1930. Sec. 7 of the Act of July 3, 1930, c. 863, 46 Stat. 1016, 1018. Only one "trial" ever took place thereunder, a performance called by Winthrop (*123) "as absurd in fact as it was unwarranted in law"; see Dig. Op. JAG, 1895, pp. 329-330,

¶15, for the details. Of course the inmates of that institution were not in military service, see *United States v. Murphy*, 9 Fed. 26 (C.C.S.D. Ohio), and even in Gen. Holt's time the provision was held unconstitutional. Dig. Op. JAG, 1912, p. 1012, ¶11 (first ruling dated 1870).

G. *Present-day boundaries are fixed, not by the sporadic excesses of the past, but by the considered rulings of the Government's law officers which condemned those excesses as illegal and unconstitutional.*

After the Civil War, when the passions aroused by that conflict had subsided, and after Judge Advocate General Holt's retirement in 1875,¹¹ the principles of court-martial jurisdiction over civilians were reexamined.

At that time, the classic limitation of that jurisdiction to a time of hostilities and a place "in the field" were forcefully asserted by Judge Advocate General Dunn, and adopted by Attorney General Devens in 16 Op. Atty. Gen. 13 and 16 Op. Atty. Gen. 48.

It is those principles that are so strongly and convincingly set forth in Winthrop *131-*138, *142-*146.

In view of the circumstances that these rulings are now sought to be minimized (Pet. Br., No. 21, pp. 59-60), and that in 1957 they were dismissed as "indicating that at that time there was no well-established rule as to what civilians were subject to court-martial jurisdiction in time of peace" (Reply Br. for Appellant and Petitioner on Rehearing, Nos. 701 and 713, Oct. T. 1955), we have set forth in Appendix C the full text of General Dunn's opinions.

We note in passing that it might with equal logic be contended that, until *Toth v. Quarles*, 350 U.S. 11, and *Reid*

¹¹ After his death in 1894, litigation over his will led to the celebrated case of *Throckmorton v. Holt*, 180 U.S. 552. See Wigmore, *The Principles of Judicial Proof* (1913) 897-989.

v. *Corvert*, 354 U.S. 1, there was similarly no well established rule on the same subject.

H. *The fact that after three and a half years the Government still accords silent treatment to The Judge Advocate General's post trader ruling is eloquent evidence of the importance of that ruling in the present connection.*

A well-nigh conclusive answer to the argument that all civilians accompanying the forces were traditionally subject to court-martial jurisdiction, but particularly those civilians who were closely connected functionally with the operations of the Army, is found in the ruling on the amenability of the now all but forgotten post trader.

Post traders were in existence for about a generation, after the sutler was legislated out of existence effective July 1, 1867—by Sec. 25 of the Act of July 28, 1866, c. 299, 14 Stat. 332, 336—and before post canteens had been transformed into the now familiar post exchanges in 1892.¹⁵

Both by the Joint Resolution of March 30, 1867, No. 33, 15 Stat. 29, as well as by Sec. 22 of the Act of July 15, 1870, c. 294, 16 Stat. 315, 319-320 (later R.S. §1113), it was declared

¹⁵ Although further appointments of post traders were terminated by the Act of January 28, 1893, c. 51, 27 Stat. 426, their disappearance overlapped the emergence of the successor institutions. Post canteens had long been organized; their formal regulation, however, appears to date from G.O. 10, Hq. of the Army, 1889. By G.O. 11, Hq. of the Army, 1892, it was directed that "The institution now designated as the Post Canteen will be hereafter known as the Post Exchange," and the Act of July 16, 1892, c. 195, 27 Stat. 174, 178, reflected the new designation.

Other accounts of the emergence of the post exchange (*Standard Oil Co. v. Johnson*, 316 U.S. 481, 483-484; *Dugan v. United States*, 34 C. Cls. 458; *Kenny v. United States*, 62 C. Cls. 328, 335n.-336n.) appear to overlook or to misread the earlier directives.

"That such traders shall be under protection and military control as camp followers."

Moreover, by Sec. 3 of the Act of July 24, 1876, c. 226, 19 Stat. 97, 100—which according to the Attorney General (15 Op. Atty. Gen. 278, 280) did not repeal R.S. §1113, *supra*—it was further provided that every post trader

"shall be subject in all respects to the rules and regulations for the government of the Army."

The generality of the quoted provisions differs not at all from the broad language of the contemporaneous camp-follower provision, AW 63 of 1874, which declared that

"All persons serving with the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders, according to the rules and discipline of war."

According to the Government's reading of the pre-1916 Articles of War (Pet. Br., No. 21, pp. 33, 52-61), it would follow that Congress had thereby subjected post traders to trial by court-martial. But The Judge Advocate General of the Army held precisely the contrary. He said, in three successive editions of his published opinions (Dig. Op. JAG, 1901, p. 563, ¶2023; *id.*, 1895, pp. 599-600, ¶4; *id.*, 1880, p. 384, ¶4):

"A post trader is not, under the Act of 1876, and was not under that of 1867 or 1870, amenable to the jurisdiction of a military court in time of peace. The earlier statutes assimilated him to a camp-follower, but, strictly and properly, there can be no such thing as a camp follower in time of peace, and the only military jurisdiction to which a camp follower may become subject is that indicated by the 63d Article of War,

viz. one exercisable only 'in the field' or on the theatre of war. Nor can the Act of 1876, in providing that post traders shall be 'subject to the rules and regulations for the government of the army', render them amenable to trial by court martial in time of peace. * * *

If the Articles of War are intended to be included, the amenability imposed is simply that fixed by the particular Article applicable to civilians employed in connection with the Army, viz. Art. 63, which attaches this amenability only in time of war and in the field. Thus, though post traders might perhaps become liable to trial by court martial if employed on the theatre of an Indian war, as persons serving with an Army in the field in the sense of that Article, they cannot be made so liable when not thus situated * * *."

That ruling completely undercuts the view, expressed in a number of recent judicial opinions (including some now under review here),¹⁶ that the traditional military jurisdiction over accompanying civilians was exercised and properly exercisable at all times and in all places.

The foregoing ruling is duly noted in Winthrop's 1st edition (1886) at 131, where the author records that the post trader since 1867 has superseded the sutlers formerly authorized, and that (131, note 2) "No trial of a trader by court martial has ever been had or ordered."¹⁷

¹⁶ E.g., Judges Holtzman and Burger in *Guagliardo*, No. 21, R. 28-31, 47-50; Judge Arraj in the present case, R. 63-69; *In re Varney's Petition*, 141 F. Supp. 190 (S.D. Calif.); *In re Yokoyama*, 170 F. Supp. 467 (S.D. Calif.).

¹⁷ We have not been able to find the full text of the post trader ruling in the National Archives. A short abstract appears in the letter from The Judge Advocate General to the Secretary of War, Jan. 26, 1878 (39 Bureau of Mil. Justice—Letters Sent 395, MS., Nat. Arch.), where it is said that the legality of a state tax or license fee on a trader is a question for the state courts.

The post trader ruling was first cited on behalf of Mrs. Covert at the first hearing of her case, in a brief filed in April 1956. Brief for the Appellee, No. 701, Oct. T. 1955, pp. 46-47.

The circumstance that this ruling was never mentioned by the Government there, either at the original hearing or at the rehearing, and that it is nowhere mentioned by the Government at the present Term, in any of the briefs filed up to now, either in No. 21, or in No. 22, or in this case, must surely be regarded as significant.

It may show that the Government regards the post trader ruling, at least reflexly, as too important or too dangerous to notice. It may show, alternatively or additionally, that the arguments in support of the jurisdiction now in question cannot be regarded either as accurately setting forth or as accurately evaluating the state of the authorities.

No doubt the Court will be able to appraise the matter adequately without further comments on our part.

It is sufficient now to point out the tremendous change that the rulings discussed in the preceding subheading and set out in Appendix C, as well as the ruling regarding the post trader, effected in the contents of the next edition of the Digest of Opinions of The Judge Advocate General of the Army.

The 1868 edition, the last prepared under the supervision of General Holt, contained not only his rulings upholding the trials of civilians by military commission that had been condemned in *Ex parte Milligan*, 4 Wall. 2, see Dig. Op. JAG, 1868, pp. 225-232, but contained as well (p. 84) his 1866 memorandum regarding the scope of court-martial jurisdiction over civilians that is printed in Pet. Br., No. 21, pp. 56-57.

In the 1880 edition, the first under the new regime, all of the foregoing are omitted, and instead there are digested the restrictive rulings of the 1870s. Dig. Op. JAG, 1880, pp. 48-49, 211-212, 384.

It is indeed a strange evaluation that prefers the discarded rulings of a regime whose overreaching had met with such signal judicial disapprobation to those of a new set of law officers whose lodestar was a strict enforcement of the Constitution that they had sworn to support and defend.

1. No constitutional justification was ever offered in 1916 for the extension of military jurisdiction then enacted, nor at any time thereafter.

Under this heading, we incorporate by reference the matter at pp. 99-100 of the *Singleton* brief in No. 22.

We emphasize that, in 1916, when the by then traditional limits of military jurisdiction were expanded at General Crowder's urging, no constitutional justification for the extension was offered.

Gen. Crowder was anxious to reach cases such as that of the thieving quartermaster clerk in the 1906-1909 intervention in Cuba, who had gone unwhipped of punishment because of an amnesty proclamation. Sen. Rep. 130, 64th Cong., 1st sess., p. 38.

For the rest, his premises were notably inarticulate; significantly enough, both have since been rejected by this Court.

(1) He assumed that when the Army was overseas it was (p. 32) "away from the protection of constitutionally guaranteed rights," a proposition no longer tenable under cases subsequent to 1916: *Balzac v. Porto Rico*, 258 U.S. 298, 312;

United States v. Curtiss-Wright Corp., 299 U.S. 304, 318; *United States v. Belmont*, 301 U.S. 324, 332; *United States v. Pink*, 315 U.S. 203, 226.

(2) He assumed (p. 70) that the test of jurisdiction was whether a case arose in the land and naval forces, viz., that the Fifth Amendment conferred military jurisdiction. *Toth v. Quarles*, 350 U.S. 11, 14, exploded this notion, which indeed Winthrop (¶53) had never accepted for a moment. See *Singleton* brief in No. 22, pp. 101-102.

But the mystery of the 1916 Revision still remains: Why did Gen. Crowder never refer to the contrary views set forth in Winthrop, and similarly set forth in the 1912 Digest of Opinions that had just been published under his own direction?

J. On the only occasions from 1793 to 1916 when the Attorney General and The Judge Advocate General of the Army gave reasoned consideration to the question whether trials of civilians by court-martial in time of peace contravened constitutional limitations, they answered that question with a resounding affirmative.

The foregoing survey of the historical and administrative materials relating to military trials of civilians in time of peace shows several distinct periods.

1. In the first, from 1793 to 1798, numerous civilians were tried by court-martial. Only a limited number of those trials fall within the narrow limits for which the Government now contends. The jurisdiction then exercised represents primarily the imperious tempers of the commanders concerned, and renders understandable the conflict between civil authorities and the army that was prevalent at the time. There is no showing whatever of executive or legislative acquiescence, much less of ratification, and the only

contemporary expressions from higher authority, by President Washington himself, emphasize the subordination of the military to the civil authority. In short, the precedents of the 1790's cannot in any sense be considered as infused into the contemporary reading of the Constitution. They belong to history only insofar as history necessarily comprehends a recital of past abuses.

2. The second period, from 1825 to 1858, at a time of great military activity over a wide area by a small but highly professional force, has yielded up only seven scattered trials of civilians by court-martial in peacetime, most of which took place where the civil courts were functioning. Those instances are far too sporadic to establish a settled practice—and to the extent that they do, it is the palpably illegal practice of trying civilians by court-martial in areas served by civil courts.

3. The third period is that of the Civil War and its immediate aftermath, primarily notable in the present connection as presenting the first occasion on which the legality of military trials of civilians in peacetime appears to have been formally considered by one of the Army's law officers.

General Holt's memorandum on that occasion (Pet. Br., No. 21, pp. 56-57; Dig. Op. JAG, 1868, p. 84) does not discuss the constitutional question, and is moreover unpersuasive since it was written just before *Ex parte Milligan*, 4 Wall. 2, set the final seal of constitutional disapproval on the system of military trials of civilians that represented his unique contribution to the conduct of what in United States Government circles was then always described as the War of the Rebellion. The authority of General Holt, accordingly, had better not be invoked to support a military jurisdiction over civilians.

4. The next period, from 1877 to 1912, represents the classic period of American military law, when Winthrop wrote his still authoritative work, and when The Judge Advocate General of the Army so vigorously insisted on the Army's observance of constitutional limitations that, when the Attorney General in a momentary lapse had purported to approve military trials of civilians, he recalled to that officer the principles involved, and obtained ultimate disapproval of such trials. See the memoranda printed in Appendix C.

This period also saw the publication of no less than four editions of the Digest of Opinions of The Judge Advocate General of the Army, in 1880, 1895, 1901, and 1912. All of those editions announced the principle that no civilian was constitutionally amenable to trial by court-martial in time of peace. The first three, see page 67, *supra*, also stated that "strictly and properly, there can be no such thing as a camp follower in time of peace," a holding omitted from the 1912 edition only because the class of persons concerning whom this had been said—the post traders—had ceased to exist.

5. The fifth period begins with 1916, when General Crowder successfully urged on Congress the AW 2(d), now the Art. 2(11), jurisdiction. But he undertook no constitutional justification for this extension of court-martial jurisdiction, nor did he even suggest that a constitutional question was involved. It is therefore not possible to attach to Gen. Crowder's position the same weight to which the reasoned expositions of his predecessors in the earlier period are entitled, particularly since both of his inarticulate major premises have since been shown to be unsound.

This fifth period rests, doctrinally, on the assumption that military jurisdiction is properly exercised over all

"cases arising in the land or naval forces," i.e., that the exception in the Fifth Amendment constitutes a grant of military jurisdiction. Although Winthrop had with unerring perception pointed out the fallacy of this assumption (*53), it was uncritically embraced by courts and commentators alike, and was not finally laid to rest until *Toth v. Quarles*, 350 U.S. 11, in 1955.

If, therefore, the long continued practice of the officers charged with the administration of a statute is to be given effect, and if that practice is to be considered most weighty when it is supported by a reasoned exposition of the factors shaping it, then, very plainly, the military practice from 1877 to 1912 is the most persuasive of all in demonstrating that trials of the nature now under consideration are not authorized by the Constitution and violate the guarantees of the Bill of Rights.

We cannot forbear to add that the Government appears to share this view, since it has meticulously failed to discuss (or even cite) the opinions of The Judge Advocate General of the Army appearing in the 1880, 1895, 1901, and 1912 editions of the Dig. Op. JAG, and since, if consistent silence is any indication, it seems not yet prepared to acknowledge the existence of the post-trader ruling.

IV. No Controlling or Indeed Persuasive Judicial Authority Sustains the Peacetime Military Jurisdiction Over Civilians That Is Now Asserted.

We discuss "the decided cases" (Pet. Br., No. 21, pp. 61-66) only for the sake of completeness; after all, even a consistent series of lower court cases does not foreclose this Court's examination of the basic constitutional question involved.

It is only necessary to refer to the recapture provision of 1863, that was carried into AW 60 of 1874, AW 94 of

1916 to 1948, and finally into Art. 3(a), UCMJ. The constitutionality of that enactment was fairly consistently sustained over a long period: *In re Bogart*, 2 Sawy. 396, Fed. Case No. 1596 (C.C.D. Calif.); *Ex parte Joly*, 290 Fed. 858 (S.D.N.Y.); *Terry v. United States*, 2 F. Supp. 962 (W.D. Wash); *United States v. Hildreth*, 61 F. Supp. 667 (E.D. N.Y.); *Kronberg v. Hale*, 180 F. 2d 128 (C.A. 9), certiorari denied, 339 U.S. 969. Yet this Court on more complete consideration held the provision invalid. *Toth v. Quarles*, 350 U.S. 11.

A. *What was said in Duncan v. Kahanamoku was dictum and moreover cited wartime cases.*

In *Duncan v. Kahanamoku*, 327 U.S. 304, 313, this Court said:

"Our question does not involve the well established power of the military to exercise jurisdiction over * * * those directly connected with such [armed] forces * * *"

—and cited four wartime cases, *Ex parte Gerlach*, 247 Fed. 616 (S.D.N.Y.); *Ex parte Falls*, 251 Fed. 415 (D.N.J.); *Ex parte Jochen*, 257 Fed. 200 (S.D. Tex.); and *Hines v. Mikell*, 259 Fed. 28 (C.A. 4), certiorari denied, 250 U.S. 645, all of which were either in fact or else held to be "in the field."

We have added the italics in the quotation to emphasize that the Court was not considering the question now before it and that whatever was said was dictum on its face; and we have done so primarily because the italicized words do not appear in any of the quotations from the *Duncan* case set forth in Pet. Br., No. 21, at pp. 60, 65, 66.

Otherwise stated, the Government nowhere discloses that the remarks on which it now relies were *obiter*.

Once that circumstance is borne in mind, it becomes apparent that the argument in support of the jurisdiction is being rested on a few words mentioned *arguendo* to show what was not being decided, and that those words are now being put forward on the footing that the Court passed on what it plainly said was not involved.

B. *The lower court cases relied on are either not in point or else quite unpersuasive.*

Apart from the decisions now under review, we have found 16 cases that involved a test of military jurisdiction over civilians. We have divided these into several categories, duly labeled; an asterisk preceding the citation indicates that the decision does not appear in any Government brief presently filed.

(1) The first group includes all wartime cases arising "in the field" as that term was always rigidly and narrowly interpreted both by The Judge Advocate General of the Army as well as by the Attorney General. See rulings collected at pp. 29-32 of the *Singleton* brief in No. 22.

1. *Ex parte Gerlach*, 247 Fed. 616 (S.D.N.Y.) (Army transport on high seas, World War I).
2. *In re Di Bartolo*, 50 F. Supp. 929 (S.D.N.Y.) (Eritrea in World War II).
3. *Hammond v. Squier*, 51 F. Supp. 227 (W.D. Wash.) (merchant mariner in South Pacific, World War II; jurisdiction not sustained).
4. *In re Berue*, 54 F. Supp. 252 (S.D. Ohio) (Army vessel on high seas, World War II).
5. *Perlstein v. United States*, 151 F. 2d 167 (C.A. 3), certiorari granted, 327 U.S. 777, and dismissed because moot, 328 U.S. 822 (Eritrea in World War II).

- *6. *Shilman v. United States*, 73 F. Supp. 648 (S.D. N.Y.), reversed in part, 164 F. 2d 649 (C.A. 2), certiorari denied, 333 U.S. 837 (Tunisia in World War II).

The *Perlstein* case seems doubtful. There the relator had left Eritrea and proceeded to Egypt; he was apprehended in Egypt, and returned to Eritrea for trial. It may well have been this aspect of a wartime "in the field" case that induced the granting of certiorari—a circumstance which, as it happens, is not noted in the citation at Pet. Br., No. 21, p. 64. Cf. *Toth v. Quarles*, 350 U.S. 11.

(II) A second category of cases arose in occupied territory after the close of World War II. There the military jurisdiction, if exercised without discrimination, could be supported by the doctrine of *Madsen v. Kinsella*, 343 U.S. 341. In fact, however, compare pp. 92-96 *infra*, the jurisdiction appears to have been asserted under AW 2(d) of 1920, and the opinions sustained it on the basis of that provision.

7. *United States v. Handy*, 176 F. 2d 491 (C.A. 5), certiorari denied, 338 U.S. 904 (occupied Germany, 1948).
8. *Greece v. France*, 75 F. Supp. 433 (E.D. Wis.) (occupied Germany, 1946).

(III) A third group of wartime cases involved the exercise of military jurisdiction over civilians in the United States in both World Wars on the footing that they were "in the field."

9. *Ex parte Falls*, 251 Fed. 415 (D.N.J.) (cook leaving Army transport at pier in Brooklyn, N. Y.).
- *10. *Ex parte Weitz*, 256 Fed. 58 (D. Mass.) (contractor's employee at Camp Devens, Mass.; jurisdiction not sustained).

11. *Ex parte Jochen*, 257 Fed. 200 (S.D. Tex.) (quartermaster employee on the Mexican border).
12. *Hines v. Mikell*, 259 Fed. 28 (C.A. 4), certiorari denied, 250 U.S. 645 (quartermaster's stenographer at Camp Jackson, S.C.).
13. *McCune v. Kilpatrick*, 53 F. Supp. 80 (E.D. Va.) (cook leaving Army transport at Norfolk).
- *14. *Walker v. Chief Quarantine Officer*, 69 F. Supp. 980 (D.C.Z.) (engineer employee in Panama Canal Zone; jurisdiction not sustained).

Such of the foregoing cases as sustained the military jurisdiction cannot, it is submitted, be regarded as sound. In the sense expounded by General Devens (14 Op. Atty. Gen. 22), no part of the continental United States, excepting only the westernmost Aleutians in 1942-1943, was ever "in the field" in either World War, and to hold otherwise was simply semanticized assertion: military operations were not in fact in progress. Those cases ignored Washington's sage admonition (34 *Writings of Washington* 160), "that the whole country is not to be considered as within the limits of the camp."

Moreover, the reasoning of the World War I cases—which set the pattern—leaves much to be desired. In *Jochen*, for instance, the Mexican Border was held to be "in the field" because service there was "field service" within the terms of a Quartermaster Manual. In *Hines v. Mikell*, South Carolina was held to be "in the field" because Army Regulations and pay statutes so regarded Camp Jackson for purposes of allowing military personnel the commuted value of their quarters. Why those circumstances justified withholding the protection of the Sixth Amendment from civilians is nowhere discussed in those opinions.

(It might also be noted that both *Falls* and *Jochen* proceeded on the now rejected view that the Fifth Amendment constitute a grant of military jurisdiction.)

In any event, none of the foregoing were peacetime cases, such as the ones now before the Court.

(IV) Two recent district court decisions do uphold the jurisdiction now asserted.

15. *In re Varney's Petition*, 141 F. Supp. 190 (S.D. Calif.) (civilian employee of Army in Japan in 1955).

16. *In re Yokoyama*, 170 F. Supp. 467 (S.D. Calif.) (same, in 1958).

We do not find either of these opinions persuasive, essentially because neither takes into account the circumstance that the law officers of the Government consistently limited the operation of "in the field" to a time and place where military operations were in progress. It may be noted in addition that the court in *Varney* specifically refused to follow Judge Tamm in the *Covert* case below, and that the opinion came down while *Covert* was *sub judice* here; and that the court in *Yokoyama* seems to be still unaware that the 1956 opinions in *Krueger* and *Covert* have been withdrawn. See 170 F. Supp. at 473, note 25.

(V) Finally (Pet. Br., No. 21, p. 65, note 44), reference is made to rulings by the Court of Military Appeals that sustained the jurisdiction of courts-martial under Art. 2(11), UCMJ. That tribunal similarly sustained court-martial jurisdiction over Mrs. Dorothy Krueger Smith (*Smith*, 5 USCMA 314, 319), after which this Court held that no such jurisdiction existed. *Kinsella v. Krueger*, 354 U.S. 1.

The simple answer is that the question involved, in all of the cases presently before this Court, is the extent of military jurisdiction under the Uniform Code, which includes of course the scope of the Court of Military Appeals' own jurisdiction. Consequently the views of that tribunal as to its own powers are plainly not authoritative when those very powers are in issue. Significantly enough, every ruling of the Court of Military Appeals now cited antedates *Reid v. Covert*, 354 U.S. 1.

The result is that, of the decisions of Federal courts of general jurisdiction now relied on, only four deal with trials of civilians by court-martial in time of peace. All but one of those was decided before *Reid v. Covert*, 354 U.S. 1, and the sole exception appears unaware that the first opinions in that litigation have been withdrawn.

It follows that the relevant residue of the Government's judicial authorities is not in any sense impressive—an observation that can hardly be dismissed as overstatement.

V. The Government's Arguments as to the Alleged Necessity of Trying Civilian Employees by Court-Martial and the Alleged Lack of Acceptable Alternatives Are Incomplete to the Point of Being Misleading.

We incorporate by reference the discussion at pp. 106-107 of the *Singleton* brief in No. 22 with reference to the basic inconsistency between *Wilson v. Girard*, 354 U.S. 524, and the present contentions now being made in support of the military jurisdiction; as well as the suggestion, pp. 108-109 of the same brief, that the Court should call for the production of named recent agreements with foreign countries, agreements which cast doubt on the assertion (Pet. Br., No. 21, p. 76) that all American civilians with the armed forces live in purely American communities.

We pause to note that, although the NATO agreement concedes primary jurisdiction over civilian dependents to the receiving state, it leaves primary jurisdiction over civilian employees to the sending state. What is said in *Singleton* concerning the NATO agreement is consequently inapplicable in this case.

Here again, we will not undertake a point-by-point refutation of the Government's contentions, but will simply note here the significant matters that those contentions fail to mention.

A. *The Government omits to advise the Court that the reason why so many civilian employees are now accompanying the armed forces abroad is purely budgetary.*

Nowhere in the lengthy argument on "practical necessity" (Pet. Br., No. 21, pp. 71-82) is there any mention of the budgetary considerations underlying the presence of so many civilian employees with the armed forces abroad. Yet this fact can easily be established by reference to materials of unimpeachable authenticity.

1. In 1954, the House Committee on Appropriations told the Army (H.R. Rep. 1545, 83d Cong., 2d sess., p. 16) that "one obvious alternative to military manpower is the use of more civilians whose annual cost is considerably less, on the average, than that of the man in uniform."

Sec. 720 of the Defense Appropriation Act of that year (Act of June 30, 1954, c. 432, 68 Stat. 337, 354), therefore authorized the substitution of civilian for military personnel "whenever, in the opinion of the Secretary of the Military Department concerned, the direct substitution of civilian personnel for an equivalent or greater number of military personnel will result in economy without adverse effect upon national defense * * *

Accordingly, the Army undertook the process of substituting 11,888 civilians for 12,495 military personnel under the title "Operation Teammate." See *Department of the Army Appropriations for 1956*, Hearings before the Subcommittee of the House Committee on Appropriations, 84th Cong., 1st sess., pp. 4, 74, 296-297, 459-463, 1124-1126. As expressed by Brig. Gen. Westmoreland of the Personnel Division of the Army's General Staff (*id.*, pp. 459, 1125):

"In general terms, this policy provides for the maximum use of civilian personnel in all positions which do not require military skills or military incumbents for reasons of training, security, or discipline.

* * * * *

"What we are doing is changing the composition of our military-civilian work force by increasing the percentage of civilians."

An official comment on Operation Teammate (*Army Information Digest*, Vol. 10, No. 4 (April 1955), p. 47) was that "The program will permit the Army to retain in service a number of combat units which otherwise would have been inactivated due to reduced personnel ceilings."

In the following year, Congress was advised of the savings effected by Operation Teammate. *Department of the Army Appropriations for 1957*, Hearings before the Subcommittee of the House Committee on Appropriations, 84th Cong., 2d sess., pp. 156, 316 *et seq.*, and see particularly the chart at 318 showing actual savings.

2. In this connection, it is an historical fact that "The Navy's Construction Battalions, popularly known as the Seabees, were established to meet the wartime need for uniformed men to perform construction work in combat

areas." 1 *Building the Navy's Bases in World War II. History of the Bureau of Yards and Docks and the Civil Engineer Corps, 1940-1946* (1947) 133. It was found that, when war came, contractors' employees who were civilians not only lacked the training necessary to defend themselves, but could not consistently with international law bear arms against the enemy. *Id.*

3. If, therefore, civilian employees cannot be tried by court-martial and thus subjected to military control in the degree thought necessary by overseas commanders, it is plain that these employees' positions do require "military incumbents for reasons of * * * discipline" (Gen. Westmoreland, *supra*, p. 144), and that civilians cannot be substituted for such military incumbents "without adverse effect upon national defense" (Sec. 720 of the Act of June 30, 1954, *supra*).

In view of the circumstance that these matters were duly disclosed in 1957 (Supp. Br. on Rehearing for Appellee and Respondent, Nos. 701 and 713, Oct. T. 1955, pp. 143 *et seq.*), it seems fair to infer that the Government's failure to deal with them now indicates that no acceptable answer can be formulated.

B. *The Government omits to explain to the Court why, if its civilian employees must be subjected to military discipline, they cannot be incorporated in the armed forces.*

If there is in fact any practical reason why persons like Guagliardo, Wilson, and Grisham must be under military control and discipline—apart from budgetary considerations, which we submit are inadmissible in a situation that concerns constitutional guarantees of individual liberty—why can they not be given actual military status, as the Navy did in the case of its construction workers?

No showing has been made that such a status would be unacceptable, and, if it were, there is ample power at hand to require and compel the service of the necessary individuals. Just as "The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes" (*Buck v. Bell*, 274 U.S. 200, 207), so the power that compels a doctor or dentist to serve in the armed forces (*Orloff v. Willoughby*, 345 U.S. 83; 50 U.S.C. App. §§454a-454e; Act of Mar. 23, 1959, P.L. 86-4, 73 Stat. 13) is ample to compel the service of an electrician (Guagliardo), an auditor (this petitioner), a cost accountant (Grisham), and—if need be—a nuclear physicist.

We submit that it would not be a convincing argument for subjecting civilians to trial by court-martial in time of peace that the United States is not prepared to pay what it would cost to give them military status, or is similarly not prepared to exert its undoubted power to compel their services in a military capacity.

We say, "would not be": there is no indication in petitioners' brief in No. 21 that either of these rather obvious alternatives has ever been given any substantial consideration.

C. The cases of the civilian employees now before the Court fail to establish any inseparable connection between them and their offenses and the military forces.

Apart from generalities of doubtful value, generalities that still rely on the stale and self-serving *ex parte* communications of the very military commanders whose powers are in issue, and that were adduced in 1957, no specific argument is advanced why the particular civilian employees now involved and their particular offenses demonstrate an inseparable or indeed even a close connection with the military forces.

No such specific argument, we submit, can be made.

(1) In *Grisham*, the employee arrived in France in October 1952 (No. 58, R. 12), he lived in an apartment in the city of Orleans (*id.*), and his wife joined him there either late in November or early in December (R. 13). A few days thereafter, on the night of 6/7 December, following a cocktail party at which one of them became drunk, Grisham killed his wife (*Grisham*, 4 USCMA 694, 695).

From the 7th through the 23rd of December, he was in the custody of the French police (*id.*).

We ask, of what possible concern was this purely civilian homicide on French soil to anyone except the French civil authorities? Certainly nothing in Pet. Br., No. 21, pp. 79-82, under the heading "The need for court-martial jurisdiction," even faintly explains why the mere circumstance that Grisham was employed as a cost accountant by Army engineers (No. 58, R. 12), entitled to some amenities as fringe benefits (R. 13-15) but still on the payroll of the U.S. District Engineer at Nashville, Tenn. (R. 11-12, 13, 15), imperatively required his trial by court-martial, or why (Pet. Br., No. 21, pp. 83-89) trial in a French court for homicide would not equally well have insured the success of the American military mission in the Army's Communication Zone.

(2) In this case, a civilian whom two doctors considered "a psychopathic personality on the borderline of schizophrenia" (R. 45, 46), pleaded guilty (R. 24) to a series of sexual offenses with seven individuals (R. 19-22). Only three of the latter were American soldiers; the nationality of the others is not shown, nor does the printed record indicate whether they were connected with the military community.

Since the soldiers in question were punishable for their acts under Art. 125, UCMJ, it is difficult if not impossible

to understand why this petitioner's conduct could not have been adequately dealt with by the German authorities—if indeed his acts were appropriate for criminal prosecution.¹

In this connection, it seems to us significant that, in legislating for the District of Columbia, Congress has declared that a person found to be a sexual psychopath is to be committed to Saint Elizabeth's Hospital. Act of June 9, 1948, c. 428, 62 Stat. 347, §§201-209; D.C. Code (1951 ed.) §§22-3503 *et seq.*

Why the maintenance of the American military position in Berlin requires similar action on the part of a civilian there to be tried by court-martial, or just how five years' confinement in a penitentiary (R. 8)—petitioner is now at Fitzsimons Army Hospital only because of a tubercular condition—will assist in arresting petitioner's proclivities, is not sought to be explained.

It could not be.

(3) The record of Guagliardo's trial by court-martial, so we are advised by his counsel, shows that he lived in an apartment in the city of Casablanca, and that, like Grisham, he was originally in the custody of and interrogated by, the local authorities. See ACM 14775, *Hall et al.*, 25 CMR 874, 882, review denied, 26 CMR 516.

Guagliardo was charged with stealing property of the United States and with conspiring with two airmen to do so (No. 21, R. 5). Those acts constituted violations of 18 U.S.C. §§641 and 371, respectively, and involved an injury to the interests of the United States. They accordingly applied to American citizens everywhere in the world (*Blackmer v. United States*, 284 U.S. 421; *United States v. Bowman*, 260 U.S. 94), with the result that

¹ The question of German jurisdiction is discussed below, p. 100.

Guagliardo and his two co-conspirators could have been flown back to the United States and tried in the first judicial district in which their plane touched American soil. See *Chandler v. United States*, 171 F. 2d 920, 932-933 (C.A. 1), certiorari denied, 336 U.S. 918, construing Judicial Code, §41, now 18 U.S.C. §3238.

Nowhere in the course of their 111 page brief in No. 21 do petitioners ever seek to explain, much less actually explain, why it was either impracticable or unacceptable to pursue that remedy, the constitutional validity of which could not have been questioned.

It is admitted (Pet. Br., No. 21, p. 84) that "foreign courts now try civilian employees and dependents in many cases."

"However;" the quoted passage continues, "if the offense involves only American personnel or property, it cannot be expected in every case that the jurisdiction of the foreign tribunals will be invoked with the same vigor as if foreign nationals or property were involved."

That assertion would be more persuasive if it were shown that in Guagliardo's case it was the local authorities who evidenced a lack of vigor, and that they did not simply turn him back to the Air Force because the Air Force authorities insisted in trying him by court-martial on their own.

D. *The contentions in support of the jurisdiction simply repeat what was said in 1956 and 1957 and fail to show any genuine effort to re-study the problem of law enforcement in respect of civilian employees overseas.*

On November 7, 1955, this Court in *Toth v. Quarles*, 350 U.S. 11, 14, said what of course should always have been

obvious, that the "except in cases arising in the land or naval forces" clause of the Fifth Amendment "does not grant court-martial power to Congress." This holding necessarily destroyed every vestige of doctrinal support for peacetime military jurisdiction over civilians. Cf. Morgan, *Court-Martial Jurisdiction over Non-Military Persons under the Articles of War*, 4 Minn. L. Rev. 79, 107.

Mrs. Covert's petition for habeas corpus was filed ten days later (R. 1, No. 701, Oct. T. 1955), and she was released by Judge Tamm on November 22, 1955 (R. 131-134).

Ever since then, and certainly since November 5, 1956, when this Court granted the rehearing in that case (352 U.S. 901), the Department of Defense—which is primarily and perhaps solely interested in this jurisdictional question, the concern of the Department of State being limited to the status of Berlin, as to which see pp. 90, 97, below—even since then, and, preeminently, since June 10, 1957, the date of *Reid v. Covert*, 354 U.S. 1, the Department of Defense has been on notice that military jurisdiction over any civilians in time of peace has been, at the very least, extremely doubtful.

Viewing its arguments in the present quartet of cases as dispassionately as is possible for opposing counsel, we are constrained to say that, after careful consideration of what has been advanced, we find reflected therein no evidence of any restudy of the problem of law enforcement in respect of civilians overseas beyond "Let's see if we can't keep *Reid v. Covert* limited."

Certainly there is no indication that the matter has been presented to or discussed with Congress with a view to new legislation. Indeed, not even the most obvious gaps have been plugged.

Thus, Chapter 37 of Title 18, Espionage and Censorship, applies "within the admiralty and maritime juris-

diction of the United States and on the high seas, as well as within the United States." 18 U.S.C. §791. If persons without military status cannot be tried by court-martial in peacetime, these provisions are on their face insufficient to reach what the Government urges as vital (Pet. Br., No. 21, p. 87), *viz.*, security violations by civilian employees overseas. Yet no effort appears to have been made to extend the scope of this chapter, a matter that raises no constitutional problem whatever (*Blackmer v. United States*, 284 U.S. 421, 437), and which would leave the Government free to return the offender to the United States for trial under 18 U.S.C. §3238.

All that is offered is a rehash of what was presented in 1957, buttressed only by expressions of disagreement with the holding of *Reid v. Covert*, 354 U.S. 1 (Pet. Br., No. 21, pp. 91, 98-99).

The basic approach is still that of the Army Board of Review in Mrs. Dial's case (No. 22, R. 22), that:

"the necessity for military jurisdiction * * * is sufficient to overcome the requirements of Article III and the Fifth and Sixth Amendments."

The infirmities of the argument of necessity were long ago pointed out by this Court, see *Ex parte Milligan*, 4 Wall. 2, 120-121, and Mr. Justice Cardozo with characteristic felicity spoke of preserving our great ideals against "the assaults of opportunism" and "the expediency of the passing hour."¹⁹

¹⁹ "The great ideals of liberty and equality are preserved against the assaults of opportunism, the expediency of the passing hour, the erosion of small encroachments, the scorn and derision of those who have no patience with general principles, by enshrining them in constitutions, and consecrating to the task of their protection a body of defenders. By conscious or subconscious influence, the presence of this restraining power, aloof in the background, but

What is perhaps more immediately pertinent is that, as this brief and the *Singleton* brief in No. 22 amply demonstrate, the Government's present arguments concerning the alleged "practical necessity" and the alleged lack of an "acceptable alternative" omit entirely too much to carry conviction, and that those contentions all too plainly disclose that no real effort has yet been made to find a constitutional substitute for the unconstitutional trials of civilians by court-martial in time of peace.

VI. Even on the Assumption That Berlin Is Still Occupied Territory for All Purposes, Petitioner's Trial by Court-Martial Cannot Be Sustained as an Exercise of Military Government Jurisdiction Over Him.

We will assume (Resp. Br. 14-23) that "Berlin continues under military occupation," for all purposes, and of course we do not question the proposition (*id.*, 8-14) that "Military trials may validly be held in territory under military occupation."

It is our position that it is clear on the present record that no military government jurisdiction was ever sought to be exercised over petitioner; that military jurisdiction over him was never sustained on that basis; that his Art. 2(11) trial cannot now be converted into a military government trial at this juncture; and that, inasmuch as no general military government jurisdiction is now being exercised by the United States forces in Berlin, the purported exercise thereof limited to those civilians who fall within the terms of Art. 2(11) would necessarily be discriminatory and invalid.

none the less always in reserve, tends to stabilize and rationalize the legislative judgment, to infuse it with the glow of principle, to hold the standard aloft and visible for those who must run the race and keep the faith." Cardozo, *The Nature of the Judicial Process*, 92-93.

A. *The Army did not purport to exercise military government jurisdiction over petitioner, his trial was never sustained at any stage on that basis, and it cannot be converted into a military government trial now.*

1. At military law, the charges preferred against an accused who is not in the military service must include "a description of the accused's position or status which will indicate the basis of jurisdiction of a court-martial." MCM, 1951, p. 469, ¶4. This has long been the requirement. MCM, 1949, App 4c, p. 311; MCM, 1928, App. 4c, pp. 236-237; MCM, 1921, App. 6 (g), at p. 566; MCM, 1917, App. 4 (g), p. 335.

The charges in the present case (R. 19-22) consistently describe petitioner as "a person serving with, employed by, and accompanying the armed forces without the continental limits of the United States in Berlin, Germany." Those words copied the then (50 U.S.C. [1952 ed.] §552) language of Art. 2(11), UCMJ.

The charges in the present case did not describe petitioner either as "a person resident in occupied territory in Berlin, Germany," or as "a person subject to the law of war."

Thus it is plain, on the face of the proceedings, that the Army undertook to exercise an Art. 2(11) jurisdiction over petitioner as a civilian employed by the armed forces overseas, rather than an Art. 18 jurisdiction under the law of war applicable in occupied territory.

2. The record shows that the question of military jurisdiction in this case, duly raised at the trial (R. 24, 47-52), was not determined by any judicial agency thereafter on the footing that it could be sustained on the basis of Berlin's status as occupied territory.

The Court of Military Appeals very significantly said (R. 55):

"We prefer to reach the question of jurisdiction in this case under the provisions of subdivision 11 of Article 2 rather than consider whether the circumstances obtaining in Berlin constitute that area occupied territory, as contended by Army Government counsel."

And the District Court, in the course of a lengthy opinion (R. 60-72), did not rest its sustaining of the military jurisdiction over petitioner on military government grounds, although that point was duly made on behalf of the respondent. Memorandum of Points and Authorities in Support of Return of Respondent to Order to Show Cause, *U. S. ex rel. Wilson v. Bohlender*, D. Colo., Civ. Action No. 6161. Point V, pp. 35-38.

As we shall show, it is now too late to invoke this alleged alternative basis of military jurisdiction.

3. The question at once will be asked, Why is the present situation any different from that of an indictment which, although alleging an offense against the United States, mis-cites the statute that has been violated? In the latter instance, very plainly, the indictment is good. *Williams v. United States*, 168 U.S. 382.

The same rule, that the mis-citation of the Article of War violated does not affect the validity of the charges if they otherwise state an offense under any Article, has long obtained at military law also. See Dig. Op. JAG, 1912-1940, ¶394(2), citing many rulings; MCM, 1951, ¶27; *Olson*, 7 USCMA 460.

4. But military law also includes another rule with respect to jurisdiction, to the effect that if the jurisdiction

of a court-martial is not established at the outset of the proceedings, it cannot be conferred by subsequent ratification. This rule obtained under the Articles of War and has been also applied since the effective date of the Uniform Code.

Thus, under the 1920 Articles of War, in force during all of World War II, sleeping on post by a sentinel was a capital offense in time of war. AW 86; MCM, 1928, ¶14. A special court-martial had no jurisdiction to try capital offenses. AW 13. But under AW 12 the officer competent to appoint a general court-martial had power to refer a capital case to a special court-martial, in which event the sentence adjudged could not exceed that otherwise within the punishing power of the special court-martial.

Even in many overseas areas during World War II, it was utterly unrealistic to consider sleeping on post a capital offense, and accordingly such cases were, in many general court-martial jurisdictions, regularly referred to special courts-martial for trial.

On occasion, however, short-cuts were resorted to, and a sleeping sentinel's case would be referred to a special court-martial by an officer not vested with general court-martial jurisdiction. The question then arose, could the officer who had general court-martial jurisdiction thereafter ratify those proceedings, which were consistent with his policy, or were they to be regarded as void *ab initio*.

The Judge Advocate General held that unless the trial by special court-martial of such a capital case had been authorized in advance by the general court-martial authority, the proceedings were void *ab initio*, and could not thereafter be ratified by the latter officer. 1 Bull. JAG 103, ¶369(9); 9 Bull. JAG 219, ¶370.

The Court of Military Appeals reached precisely the same result in *Bancroft*, 3 USCMA 3, under Arts. 19 and 113, UCMJ, and ¶15a(1) of 1951 MCM.

We accordingly submit that, once it is established that there is no Art. 2(11) jurisdiction over petitioner, his conviction cannot now be sustained on the basis that, by a process of subsequent judicial ratification on collateral attack, he could have been charged and tried as a resident of occupied territory, although he was in fact charged and tried as a civilian with the armed forces overseas. The principle of the *Bancroft* case and of the predecessor rulings cited forbids.

5. We are aware that the decision of the Court of Military Appeals in *Schultz*, 1 USCMA 512, is opposed to us on that issue. That decision, plainly, is not controlling, and, for reasons about to be stated, we submit that it cannot be supported.

There one Schultz, an American civilian in Japan, was tried for involuntary manslaughter and drunken driving, being described in the charges as "a person serving with the armies of the United States without the territorial jurisdiction of the United States." See 4 CMR at 576-577. It appeared, however, that he had been employed as the manager of a civilian club supported by non-appropriated funds, and that even such employment had been terminated before the charges were served on him. The Court of Military Appeals accordingly held that in those circumstances he was neither a retainer to the camp nor a person accompanying or serving with the armies so as to render him subject to military law under AW 2(d), then still in effect.

However, the court went on to hold that, Japan being at the time under occupation, the military government

jurisdiction of the general court-martial under AW 12 was sufficient to reach Schultz as a person subject to the law of war. This conclusion was reached (1 USCMA at 520) on the footing that "Jurisdiction is a fact, not a matter of pleading," citing *Givens v. Zerbst*, 255 U.S. 11.

We submit that this reliance was misplaced, because the *Givens* case plainly does not extend that far.

There the relator had, while an officer of the Army, been convicted by a general court-martial. On habeas corpus he alleged a want of authority in the officer who convened the court and the failure of the record to show his own status as an officer in the Army. These matters were either within the realm of judicial notice or else proved at the habeas corpus hearing. Therefore, this Court held that the only question presented was (255 U.S. at 19-20):

"In a case such as that before us, where the power to convoke a court-martial is established on the face of the record, and the authority of the court to decide the particular subject before it is therefore undoubted, does the right exist, in the event of a collateral attack upon the judgment rendered, made on the ground that a particular jurisdictional fact upon which the court acted is not shown by the record to have been established, to meet such attack by proof as to the existence of the fact which the court treated as adequately present for the purpose of the power exerted?"

This Court held (255 U.S. at 20):

"Considering that subject in the light stated, we think the court below was right in admitting, as it did, evidence to show the existence of a military status in the accused, since it did not change the court-martial record, but simply met the collateral attack by show-

ing that, at the time of the trial, the basis existed for the exertion by the court of the authority conferred upon it."

Now, since every one of the allegations disputed on habeas corpus clearly appeared on the face of the record of trial by court-martial, and the proof at the hearing on the writ simply went to sustaining those allegations, it seems plain to us that *Givens v. Zerbst* is not authority for substituting entirely different allegations of jurisdiction, as the Court of Military Appeals in *Schultz* thought.

For *Givens v. Zerbst*, 255 U.S. 11, holds, not that "Jurisdiction is a fact, not a matter of pleading" (1 USCMA at 520), but only that the truth of jurisdictional averments in the proceedings of a court of limited jurisdiction can be independently established on collateral attack, and that such proof is not limited to what is found within the four corners of the challenged proceedings.

Nothing in *Givens v. Zerbst*—or in any other case of which we are aware—gives any support whatever to the Court of Military Appeals' *Schultz* doctrine that a proceeding commenced under one head of jurisdiction can, upon appellate challenge, be somehow transformed into a case under a very different head of jurisdiction, least of all when the transformation is sought to be made on collateral attack. For that would "change the court-martial record" (255 U.S. at 20).

Or, to paraphrase a recent observation, "He that takes the jurisdictional sword shall perish with that sword." *Vitarelli v. Seaton*, 359 U.S. 535, 547.

6. We submit, therefore, that a complete answer to the respondent's attempt to sustain military jurisdiction on military government grounds in the present case is the undoubted fact that the jurisdiction was never at any time rested on those grounds.

We do not dispute—indeed we could not dispute—the proposition (Resp. Br. 8-14) that “Military trials may validly be held in territory under military occupation.” We say only that the military government jurisdiction authorized by Art. 18, UCMJ, was never exercised in this case.

B. *No military government jurisdiction has in fact been exercised in Berlin by the United States since May 5, 1955.*

The underlying principles of military government jurisdiction in occupied territory were reaffirmed and restated in *Madsen v. Kinsella*, 343 U.S. 341. Thereafter, when the occupation of Germany by the three Western powers was brought to an end, the United States terminated the jurisdiction and abolished the courts pursuant to which Mrs. Madsen had been tried. And such abolition extended to Berlin as well. Art. 4, *Convention for the Settlement of Matters Arising out of the War and the Occupation*, TIAS 3425, p. 295, at pp. 301-304; Proclamation of May 5, 1955, 32 Dept. of State Bull. 791; Ex. Order 10608, 20 Fed. Reg. 3093.

And this is duly admitted by the Government—although only in a footnote (Resp. Br. 21, note 16):

“Occupation courts in Berlin have presently ceased to function.”

That admission underscores what is amply demonstrated by the present record, namely, that no military government jurisdiction was in fact exercised over this petitioner.

C. *It follows that any attempt to exercise a military government jurisdiction limited to American civilians accompanying the armed forces would be discriminatory and hence invalid.*

In the footnote just cited (Resp. Br. 21, note 16), it is further said

"The power to convene them [i.e., occupation courts in Berlin] still exists, but the practice now is to refer to a court-martial all criminal cases which might have previously been heard in an occupational court."

Evaluation of the quoted assertion requires that the jurisdiction of military government courts in occupied territory under accepted principles of international law be briefly examined. As this Court pointed out in *Madsen v. Kinsella*, 343 U.S. 341, after a full review of the authorities, the jurisdiction of such tribunals extends to all persons in the occupied territory, and covers not only the enemy nationals of the occupied areas but also all persons of whatever nationality who are resident in that territory, including American civilians accompanying the American forces, such as Mrs. Madsen in that case.

In the United States Zone of Berlin, therefore, that jurisdiction would include:

- (a) German nationals;
- (b) Nationals of other countries (e.g., Britain, France, etc.) resident in that Zone;
- (c) Americans resident in the United States Zone who have no connection whatever with the armed forces, such as business men, representatives of American airlines and the like; and
- (d) Americans actually accompanying, serving with, or employed by the United States Forces there, such as de-

pendents, Government officials actually connected with the forces, and employees like the petitioner.

To the extent therefore, that the asserted military government jurisdiction in Berlin was limited to the last of these four classes, it would, although fair on its face, be a discriminatory jurisdiction, and hence invalid in the classic sense of *Yick Wo v. Hopkins*, 118 U.S. 356, 373-374, of being "applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances." See also, *accord*, *Griffin v. Illinois*, 351 U.S. 12, 17, and cases there cited.

True, the foregoing is a Due Process point, and military government represents an exercise of the war power; but this Court has made it clear that the Due Process Clause limits even an assertion of the war power. *United States v. Cohen Grocery Co.*, 255 U.S. 81; cf. *Ex parte Endo*, 323 U.S. 283.

We should think it extremely doubtful, having regard to the relations existing between the United States and the Federal Republic of Germany, that, notwithstanding the existence of reserved paper powers, any German national or any resident of Berlin, American or otherwise, unconnected with the armed forces, has been tried by an American court-martial or by any other American tribunal in Berlin since May 5, 1955. But unless such a showing can be made, then the present exercise of court-martial jurisdiction over this petitioner cannot be supported by the invocation of Art. 18, UCMJ.

We recognize that it will probably not be necessary to explore the issue of discrimination. For the fact, amply evidenced by this record, is that the United States has not sought to exercise its reserved powers of military gov-

ernment jurisdiction in Berlin when trying by court-martial civilians with the armed forces, but has simply proceeded on the assumption that it was exercising the purported Art. 2(11) jurisdiction over such civilians under the provisions of the Uniform Code of Military Justice. Even the Court of Military Appeals, which must be taken as expressing the authoritative military view in this connection, proceeded on that basis in the present case (R. 55).

In the interest of completeness, a few words should be said regarding the jurisdiction of the German courts in Berlin to deal with petitioner in respect of the offenses with which he was charged.

There are indications in the record (R. 50, 55) that under Allied Kommandatura Law No. 7 he was not subject to the criminal jurisdiction of the Berlin courts. But the Government's brief (p. 21) makes it clear that the American sector commander could authorize the German courts to exercise criminal jurisdiction over any accompanying civilian under Article 1 of this precise Law No. 7 that was cited in the military proceedings. Consequently denial of American military jurisdiction over accompanying civilians in Berlin who commit offenses there would not in any sense mean that they would go unpunished for their acts.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed, with directions to discharge petitioner from military custody forthwith.

Respectfully submitted,

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OCTOBER 1959.

APPENDIX A

Trials of Civilians by Courts-Martial of the Continental Army Recorded in General Washington's General Orders

The *Writings of Washington* have been examined for the period from Washington's assumption of command at Cambridge in 1775 until the relinquishment of his commission in 1783. The first general order appearing therein that announces the result of a trial by general court-martial is dated July 7, 1775 (3:313), the last one bears date of June 16, 1783 (27:16).

Trials of civilian employees are separated from trials of spies and inhabitants; spies were triable under the laws of war, while inhabitants were tried under resolutions of the Continental Congress and not under the Articles of War. See the text, *supra*, pp. 33-35, where this is set forth in detail.

Cases not noted by the Government (Pet. Br., No. 21, pp. 40-42, n. 25) are prefixed by an asterisk.

Part I—Civilian Employees

- *1. 9:99 Aug. 19, 1777, Edward Willcox, Quarter Master to Captain Dorse's troop.
2. 9:101, Aug. 20, 1777, Jacob Moon, Pay Master to the 14th Va. Regt.
3. 10:359, Jan. 28, 1778, Thomas Scott who acted in the Character of a Waggon-Master.
4. 10:507, Feb. 24, 1778, Mr. Edward Bernett, Forage Master in the Marquis LaFayette's division.
- *5. 11:141, Mar. 24, 1778, Mr. Vunch Quarter Master to Colo. Livingston's Regiment tried (by his own consent).
- *6. 11:155, Mar. 26, 1778, Commissary Gambol.
- *7. 11:254, Apr. 13, 1778, Adam Gilcrest an Assistant Forage-Master.

- *8. 11:280, Apr. 19, 1778, Hugh Baker, Forage Master.
- *9. 11:367, May 9, 1778, Robert Anderson, late Waggon-Master in the Marquis's Division.
- 10. 11:487, May 29, 1778, William Whiteman, Waggoner.
- *11. 12:183, Oct. 31, 1778, Nathan Nuthall, Quarter Master to the 3rd No. Carolina Regt.
- 12. 12:242, July 27, 1778, Mr. James Davison, Quarter Master of Colo. Livingston's Regt.
- *13. 12:415, Sept. 9, 1778, Samuel Bond, Assistant Waggon Master.
- *14. 12:416, Sept. 9, 1778, Mr. Allen, Quarter-Master to the 2d Pa. Brigade.
- 15. 13:314, Nov. 23, 1778, George Albin, Express Rider.
- *16. 14:425, Apr. 22, 1779, Commissary Lewes.
- *17. 15:70, May 14, 1779, Samuel Fleming, Forage Master.
- *18. 15:365, July 4, 1779, William Shields, Waggon Master to the North Carolina Brigade.
- *19. 16:127, Aug. 18, 1779, Mr. John Price, Assistant Commissary of Forage.
- 20. 16:385, Oct. 1, 1779, Benjamin Ballard, late Assistant Commissary of Issues to Gen. Paterson's Brigade.
- 21. 16:386, Oct. 1, 1779, Mr. Paterson, Assistant Commissary of Hides.
- *22. 16:400, Oct. 3, 1779, Mr. Thornton Taylor, Conductor of Military Stores to Gen. Woodford's Brigade.
- *23. 16:479, Oct. 17, 1779, Job Scribner a Conductor of Waggon.
- *24. 18:91, Mar. 8, 1780, Mr. Tychnor Deputy Commissary of purchases.
- *25. 18:98, Mar. 9, 1780, Jacob Bailey, Esq., Deputy Quarter Master General.
- *26. 18:269, Apr. 17, 1780, Mr. Randall, State Clothier for the State of Maryland.

- *27. 19:208, July 18, 1780, William Hutton, Provost Marshal.
- *28. 19:468, Aug. 29, 1780, Mr. Israel Weed, Assistant Commissary of Issues.
- 29. 20:24, Sept. 2, 1780, Reuben George, an express rider.
- 30. 20:25, Sept. 2, 1780, Joseph Smallwood, a waggoner.
- 31. 20:961, Sept. 27, 1780, Thomas Thomason, Forage Master to Gen. Hand's Brigade.
- *32. 20:97, Sept. 27, 1780, Abraham Cooper, a waggoner.
- *33. 20:154, Oct. 11, 1780, Mr. John Christie, Forage master to Gen. Clinton's brigade.
- *34. 20:199, Oct. 16, 1780, Mr. Isaac Tichener, Assistant Commissary for the Northern Department.
- *35. 20:271, Oct. 31, 1780, George Berrien and James Berrien, Boatmen.
- 36. 21:10, Dec. 24, 1780, Mr. Benjamin Stevens, issuing Commissary at Fishhill.
- 37. 21:22, Dec. 28, 1780, Mr. Thomas Dewees, Barrack master.
- 38. 21:215, Feb. 11, 1781, Mr. Joseph Bass, clothier for the State of New Hampshire.
- 39. 21:354, Mar. 23, 1781, John Collins, late Assistant Deputy Commissary of M[ilitary] Stores (see 21:190).
- *40. 21:496, Apr. 22, 1781, Mr. William Hutton, Provost Marshal.
- *41. 22:423, July 27, 1781, John Adam, Deputy Commissary of Prisoners.
- *42. 26:261, Mar. 27, 1783, Mr. Samuel Evans, Forage Master.
- *43. 26:445, May 19, 1783, Mr. Bartholemew Fisher, Forage master.

Part II—Spies and Inhabitants

- *44, 45. 10:508, Feb. 24, 1778, Henry Lewis and John Hambleton, inhabitants.
- *46-50. 11:11-12, Mar. 1, 1778, five inhabitants.
- *51. 11:86, Mar. 15, 1778, Edward Grissel, inhabitant.
- *52-57. 11:142-143, Mar. 25, 1778, six inhabitants.
- *58. 11:202, Apr. 3, 1778, William Morgan, inhabitant.
- *59-60. 11:253, Apr. 13, 1778, Philip Culp and John Broom, inhabitants.
- *61. 11:254, Apr. 13, 1778, John Evans, inhabitant.
- *62. 12:71, June 17, 1778, John Shay, an inhabitant.
- *63. 12:299, Aug. 8, 1778, Anthony Matica, inhabitant.
- *64. 12:299, Aug. 8, 1778, William Cole, suspicion of being a spy.
- 65-66. 13:54, Oct. 10, 1778, two civilians for counterfeiting and strong suspicion of spying.
- *67. 15:363, July 4, 1779, Isaac Depue, aiding the enemy.
- *68-70. 15:364, July 4, 1779, John King, aiding the enemy; Joseph Bettys and Stephen Smith, spies.
- *71. 15:407, July 11, 1779, John Springer, a spy (also tried for advising desertion).
- *72-74. 19:23, June 18, 1780, three spies.
- *75-77. 19:221, July 20, 1780, three civilians tried on suspicion of being spies.
- *78. 19:252, July 26, 1780, Robert Thomas John Richards, spy.

APPENDIX B

Instances of Civilians Tried by American Courts-Martial, 1793-1798

Below are listed all of the instances that we have found of civilians tried by American courts-martial during the 1790s, arranged chronologically, and showing the date and headquarters of the order announcing the result of trial, the name and character of the accused, the charge, the findings, and the sentence. Where no action by the convening authority is noted, the sentence adjudged by the court-martial was approved and ordered into execution.

An asterisk preceding the cases indicates doubt concerning the accused's civilian status; see *supra*, pp. 28 and 41-43.

A. *Wayne Orderly Books*

All of the entries in the Orderly Books of Major Gen. Anthony Wayne, except for the period Nov. 17, 1792 to April 11, 1793, have been printed in 34 Mich. Pion. & Hist. Coll. 341. The balance are in MS. at the Historical Society of Pennsylvania in Philadelphia.

In the references that follow, page numbers refer to the printed portions, "MS." to those still unprinted.

1. "Saml. Wilson a carpenter in the employment of the United States"; H. Q. Legion Ville, [Pa.] Jan. 19, 1793 (MS.).

Charge: "For purchasing spirituous Liquors and for supplying the soldiers of the United States Contrary to general orders."

Findings: Guilty.

Sentence: "to be drummed out of the Cantonment from the Grand Parade, with two bottles of whiskey Suspended about his Neck." (Sec. XIII, Art. 23, cited.)

2. "George Ludwell a sutler"; H.Q. Green Ville, July 25, 1794 (p. 535).

Charge: "bringing or being concerned in bringing Whiskey into Camp contrary to the General Orders of the 26th of February last and for disposing of whiskey to soldiers."

Findings: Guilty.

Sentence: "to receive one hundred lashes & be drummed out of Camp."

3. "Solomon Brewer a Trader"; H.Q. Green Ville, July 25, 1794 (p. 535).

Charge: "Keeping a disorderly store and suffering soldiers in at a late Hour of the Night of the 21st Inst. Disposing of Spirituous Liquors, in Breach of Gen'l Orders, and Playing at Cards with Soldiers."

Findings: "Guilty of every part of the charge, but selling of Liquors."

Sentence: "to be Drummed out of Camp with a Dirty Pack of Cards about his neck."

4. "Joseph Robinson a Trader"; H.Q. Green Ville, July 25, 1794 (p. 536).

Charge: "extortion & Imposition in his dealings with the soldiery."

Findings: "acquitted for want of evidence."

5. "Philip Reily a soldier, and Samuel Farewell a sutler"; H.Q. Green Ville, July 25, 1794 (p. 536).

Charge: "Gambling, Cheating and Defrauding Serjeant Healey out of Ninety five Dollars, his Property."

Findings: Guilty as to both.

Sentence: "One hundred lashes each; That Farewells property be seized, and he remain in Custody until he refunds the sum of Ninety five Dollars to Serjeant Healey, and that the said Farewell be Drummed (out of Camp) round the Cantonment in front of the Hutts of the soldiery,

from the Grand Parade, with the following label on his forehead—The just reward of Cheating and Gambling, and a Pack of Cards suspended about the Neck—The Court also sentence that in case Farewell's property should be insufficient to reimburse the above Sum; That the Deficiency be made up to Serjeant Healey out of the Pay of Reily, to be stopped for that Purpose."

Action: Confirmed, "except reimbursing Serjeant Healy who ought to be punished as a Gambler."

6. "Robert Bowles in the employ of the Contractor"; H. Q. Miami Villages, Sept. 24, 1794 (p. 555).

Charge: Not shown.

Sentence: "to ask Pardon of Mr. Sloane, in Presence of the Men now employed by the Contractor on this Ground."

*7-11. "William Glinn, William Coyle, Sam'l Blue, William Crocker, and John Fricker, Armourers, in the Employ of the United States"; H.Q. Green Ville, Jan. 31, 1795 (p. 583).

Charge: "stealing a Kegg of Whiskey, and Secreting it in their Quarters."

Findings: Guilty.

Sentence: "under Article 5th of the 18th Section of the Rules and Articles of War, Sentence each of them to Receive 100 Lashes & have their Rations of Whiskey stopped, until a reimbursement of 1 1/2 Gallon be made to the Q'r Master."

Action: "Orders that the corporal Punishment take Place accordingly, upon the Grand Parade, at 10 OClock Tomorrow Morning, after the Manoeuvring the Guards, in the most exemplary Manner—when the Prisoners are to return to their Work, in the Artificers Yard & Shop—"

*12-15. "George Flanks, Charles Munroe, Stephen Ogden and John Small, Artificers, in the Employ of the Quarter Master General"; H.Q. Green Ville, Jan. 31, 1795 (p. 584).

Charge: "stealing & secreting Whiskey."

Findings: Guilty.

Sentence: "under Article 5th of Section 18th of the Rules and Articles of War, sentence each of them to pay for 2 1/2 gallons of whiskey, and to receive 100 Lashes."

Action: Action in cases 7-11 covered these cases also.

16-17. "Isaac Vanhist and Nathaniel Reader, Sutlers"; H.Q., Green Ville, Feb. 23, 1795 (p. 586).

Charge: "selling spirituous Liquors, to a soldier [or] Soldier of the Legion, contrary to a General Order" [of the 24th of January and the 6th of July 1794].

Findings: Guilty.

Sentence: "The Court. * * * are of Opinion, they ought to be ordered out of the Cantonment, without the Liberty of returning to it at any time hereafter, in the Capacity of Sutlers."

Action: "Orders that the said Isaac Vanhurst [and] Nathaniel Read * * * depart from the Cantonment immediately and never to return to it again in the capacity or Capacities of Sutlers on pain of Corporal Punishment."

18-19. "William Shannon a Sutler, and Matthew Gill, late a soldier in Captain Veters's Company"; H.Q., Green Ville, Feb. 23, 1795 (p. 586).

Charge: "Disobedience of Genl. Orders, Prohibiting the Sale of Whiskey, or other Spirits, and with attempting to Defraud Andrew Derring a Discharged Soldier of Twenty Dollars in charging an exorbitant Price for Goods contrary to a General Order regulating Prices—"

Findings: Guilty.

Sentence: "they are of opinion that Shannon ought to be compelled to leave the Cantonment immediately, and never be permitted to return to it again, in the Capacity of a sutler—the Court also Sentence Matthew Gill to receive 100 Lashes, and to be Drummed out of the Cantonment."

Action: As to Shannon, same as in cases 16-17; "and also orders that Matthew Gill receive the Corporal Punishment to which he is sentenced * * * and then be Drummed out of the Cantonment."

20-22. "William Irvin, Peter Walton, and Edward Gordon" [not otherwise described]; H.Q., Green Ville, Feb. 24, 1795 (p. 587).

Charge: "having in their Possession three Horses, the Property of the United States."

Findings: "Guilty of having three Publick Horses in their possession."

Sentence: "The Court * * * are of opinion they ought to lose the Money, they have Paid for the said Horses, which will be a Punishment Adequate to their Guilt."

23. "Patrick Hanabury an Artificer"; H.Q., Green Ville, May 20, 1795 (p. 612).

Charge: "repeated Drunkenness and Neglect of Duty."

Sentence: "under the 23rd Article of the 13th Section & 5th Article of the 10th [18th] Section of the Rules and Articles of War, to receive fifty lashes."

24. "William Haverland, a Sutler"; H.Q., Green Ville, June 10, 1795 (p. 618).

Charge: "Selling Liquor to a soldier on the 5th Instant, in Violation of General Orders, Prohibiting the same, on a forged permission."

Findings: Guilty.

Sentence: "under the 23rd Article of the 13th Section of the Rules and Articles of War, to be Drummed out of the Cantonment with Two Canteens or Bottles suspended about his Neck; and thence to and along in front of the Guards on the Grand Parade, and out of the Camp; and never to return in any Capacity, on Penalty of receiving such immediate Punishment as may be inflicted upon him."

25. "Samuel Shepherd a Pack Horse Man"; H.Q., Green Ville, July 5, 1795 (p. 626).

Charge: "Stealing a Publick Horse, and Bells Off Publick Oxen."

Findings: Guilty.

Sentence: "under the 23rd Article of the 13th Section, and the 5th Article of the 18th Section, of the Rules and Articles of War, to receive One hundred lashes, and to be drummed round the Cantonment, and thence out of Camp with six bells suspended about his Neck."

26-28. "Robert Mooney, Adam McKee, and Peter Griffin" [not otherwise described]; H.Q., Green Ville, July 5, 1795 (p. 627).

Charge: "stealing Bells off Publick Oxen."

Findings: "Acquitted by the Court for want of Evidence."

Action: "are to be immediately liberated."

29. "John Johnston, a Pack Horse Master"; H.Q., Green Ville, Sept. 15, 1795 (p. 644).

Charge: Neglect of duty in making unnecessary Delays, and in attention to the safe keeping, and Preservation of the Publick Horses, under his direction, from the 27th of August to the 9th of September on a Command to Fort Wayne, and back again; so that out of One hundred & eighty five Horses, committed to his charge; only One hundred & Thirty have been returned—Fifty five of them having been lost thro' his Neglect."

Findings: "Guilty of [Neglect of] Duty, in not obliging the Men under his Command, to do their Duty, by reason whereof sundry Pack Horses in his Charge were lost."

Sentence: "under the 23d Article of the 13th Section and the 5th Article of the 18th Section, of the Rules & Articles of War; to be Dismissed the service of the United States, & to forfeit three Months Pay, to compensate the United States, for the loss sustained by his Neglect."

Action: "Orders * * * that John Johnston be confined in the Provost Guard until he refund to the Acting Quarter Master General, Three Months Pay, agreeably to his Sentence."

30: H.Q. Greenville, Feb. 29, 1796 (p. 680).¹

"Peter Minard the Deserter & Betts the Whiskey Smugler will be drummed out of Camp tomorrow after the Guards are mounted * * * The Commissary is to furnish three Days full Provision to each."

B. *Orderly Books of the Corps of Artillerists and Engineers*

Four volumes entitled as above are in the Library of the United States Military Academy at West Point, N. Y. The entries run from May 7, 1795, to May 19, 1799; the last entry is on a separate slip that is pasted into the book but not copied.

30A. " * * * a woman by name Polly Toomy"; General Order, July 31, 1795 (1 *Orderly Book of the Corps of Artillerists and Engineers* 73).

No trial. Offense was that after having been drummed out of the Garrison three times, "the last being yesterday evening she has again returned the same night in defiance of the Garrison orders."

Ordered by the Commandant, Major Tousard, that "the said Polly Toomy shall be drummed out again and receive twenty lashes on her bare back * * *"

For the complete text of the order, see p. 60 of the *Singleton* brief in No. 22.

31. "Jacob Neilson Sutler belonging to this Garrison"; Oct. 7, 1795, vol. I, pp. 159-162.

Charge: "selling Liquors to the Garrison Soldiers contrary to orders."²

¹ Entry while Brig. Gen. Wilkinson was temporarily commanding in Maj. Gen. Wayne's absence; see Gen. Wayne's farewell, Dec. 14, 1795 (p. 659), and Gen. Wilkinson's assumption of command, Dec. 16 (p. 660).

² See p. 46, *supra*, for a partial text of the orders.

Findings: Guilty.

Sentence: "to pay a fine of Fifty Dollars to the United States, and do further direct that the Store from which he sold Liquor contrary to orders, be closed immediately."

Action: "Considering however the Case of Jacob Neilson, he remits to him the half of the Fine and orders the said Neilson to be kept under guard until the other half is paid into the Hands of the Paymaster, and suspends the second part of the Sentence until the first breach against the orders issued to Sutlers the 26th Sept^r. 1795. J.J.U. Rivardi, Comdt. pro^otem."

C. Wilkinson Order Book

The Wilkinson Order Book is a bound MS. volume containing 767 legibly numbered pages. It is in the Early Wars Section, War Records Division, National Archives; the entries therein run from Dec. 31, 1796, until April 23, 1808.

32. "William Mitchel Suttler": H.Q. DEtroit, July 20, 1797 (pp. 57-60).

Charge: "violation of the General Order of the 12 Instant, in selling liquor without permission to a soldier."

Findings: Guilty.

Sentence: "under the General Order of the 12th Instant, and the 23d Article of the 13 section of the rules and articles

This order (p. 48) was as follows: "

"The desertion of the Troops may be ascribed chiefly, to the scene of drunkenness produced by the unashamed Sales of liquor, which have been permitted; and to the seductive acts of persons indisposed to the Government of the United States.

"To remedy evils replete with consequences to the National Interests and so subversive of subordination and discipline. All persons are hereby prohibited selling liquor of any kind to the Troops, except under the written permission of Lieut. Colonel Commandant Strong--the infraction of this order by whosoever committed, shall be punished by the guard House, and the sentence of a General Court Martial.

"Any person attempting to inveigle a soldier from his duty, or in advising him to desert shall receive Fifty lashes, and be drummed out of the fortifications."

of War, to be drummed with a bottle suspended about his neck, with the *rouges* March (together with Lydia Conner a prisoner convicted of the like Offense, his left hand tied to her right) through the Citadel, in front of the Troops paraded; thence through the Streets of the Town, thence to and around the front of the barracks of the Soldiery in Fort Lernault, thence out of the Fort to and along the main Street, and out of the West or South West Gate of the town, not to return therein; to be forever prohibited from acting in the capacity of a trader or sutler within the lines or fortifications of the Troops of the United States, on penalty of receiving such punishment as may be inflicted upon him, by the sentence of a Court Martial."

Action: "However highly merited, he [i.e., Gen. Wilkinson] remits so much of the Sentence passed upon Mitchel, as relate to drumming, and he flatters himself that this instance of his clemency, may not be misapprehended, as no further indulgence must be expected."

33. "Lydia Conner a follower of the Army": H.Q. Detroit, July 20, 1797 (pp. 58-60).

Charge: "Violation of the General Order of the 12th Instant."

Findings: Guilty.

Sentence: Same as Mitchel's, "her right hand to be tied to his left"; see pp. 62-63 of the *Singleton* brief in No. 22 for the exact text.

Action: "The Sentence passed upon Lydia Conner, a notorious Offender, is to be carried into execution at 6 O'Clock this afternoon."

34. "James Fraser a Merchant of D'Etroit": H.Q. Detroit, July 20, 1797 (pp. 59-60).

Charge: "Violation of the General Order of the 12th Instant."

Findings: Guilty.

Sentence: "but as there is a possibility (from the words *ardent Spirits* being included in the proclamation, and not in the General Order) that he might have misconceived the latitude of the order, they only sentence him, under the General Order of the 12th Instant, and the 23d Article of the 13 Section of the rules and articles of War, to be reprimanded by the Commander in Chief in such manner as he may think proper."

Action: "With respect to Mr. Fraser, the Commander in Chief will observe, that as he can never be indifferent to the feelings of any person: Should the transgression have originated in Misapprehension, he regrets the Occasion, otherwise he hopes the process may be received as an evidence of the impartiality of the administration and of the lenity of the Court, and that it will have the effect to prevent a repetition of the Offence, which cannot be permitted or pardoned."

35. "Mathew McFall" [not otherwise described]; H.Q., D'Etroit, July 28, 1797 (pp. 66-67).

Charge: "enticing and endeavouring to persuade Jeremiah Hyland a soldier in the Service of the United States to desert therefrom."

Findings: Guilty.

Sentence: "under the 23d Article of the 13 Section of the rules and articles of War, and the General Order of the 12 Instant to receive Fifty lashes, to be inflicted with wire cuts, to have the left side of his head and his right Eyebrow close shaved, to be drummed with a rope about his Neck, his head uncovered, through the citadel and Fort Lernault, then through the streets and out of the Town, and not to return within the lines or fortifications, on penalty of receiving such punishment as may be inflicted upon him."

36. "John McKernan" [not otherwise described]; H.Q., D'Etroit, July 28, 1797 (pp. 66-67).

Charge: "violation of the General Order of the 12th Inst. in selling liquor to the Soldiery."

Sentence: "under the 23 Article of the 13 Section of the rules and articles of war, and the General order of the 12th Instant, only, to be expelled the lines and fortifications of the place (in consequence of his age, infirmity, and the character of him) and not to return therein on penalty of such punishment as may be inflicted upon him."

37. "Robert Kean a sutler"; H.Q. D'Etroit, Sept. 11, 1797 (p. 79).

Charge: "selling Liquor to soldiers without permission."

Findings: Acquitted.

38. "John Blackburn a follower of the Army," tried by garrison court-martial; H.Q. Pittsburgh, April 3, 1798 (p. 108).

Charge: "disobedience of orders in bringing whiskey into the Garrison."

Findings: Guilty.

Sentence: "to receive twenty five lashes on the bare back but in consideration of his Age and infirmity recommended by the Court to the mercy of the Commander in Chief."

Action: "The Commander in Chief approves the foregoing sentences * * * but in Consideration of the Recommendation of the Court he remits the punishment to which Blackburn and * * * were sentenced."

39. "Mathias Augustine a Subject of His Catholic Majesty's" [not otherwise described]; H.Q. Lo'tus's Heights [Miss. Terr.], Nov. 19, 1798 (pp. 168-169).

Charge: "selling spirits to the troops without permission."
Plead guilty.

Sentence: "to receive one hundred lashes, & to be drummed out of Camp with two bottles suspended by his neck."

Action: "It appears that the prisoner offers the Plea of Ignorance in extenuation of his confessed guilt,—yet it is set forth explicitly by the testimony offered on his trial

that his sales were made in a clandestine manner and that he has been guilty of falsehood in alledging to the Court the liquor sold was laid in for the consumption of his crew. —such strong evidence of conscious misconduct in the first instance and turpitude in the last, leave no doubts in the General's mind of the motives & the merits of the prisoner. He therefore approves of the sentence of the Court, but in Consideration of the amicable connexion subsisting between his Majesty of Spain and the United States of America in regard to the clemency due to a foreigner as a testimonial of the respect in which we hold a Sovereign power, and as a manifestation of our disposition to cultivate that harmony which is reciprocally interesting to the two nations the General thinks proper to remit the punishment and orders the prisoner with his property to be dismissed the verge of the Camp."

APPENDIX C

Full Text of the 1877 Opinions of the Judge Advocate General of the Army Holding Peacetime Trials of Civilians by Court-Martial to Be Unconstitutional

The originals of the following opinions of The Judge Advocate General of the Army appear in 38 Bureau of Military Justice—Letters Sent 557 and 641 (MS., Nat. Arch.), and resulted in the opinions of the Attorney General that were published in 16 Op. Atty. Gen. 13 and 48.

We have reprinted the texts which follow from pp. 86-99 of the Reply Brief for Appellant and Petitioner on Rehearing, Nos. 701 & 713, Oct. T. 1955.

WAR DEPARTMENT,
BUREAU OF MILITARY JUSTICE,

April 16, 1877.

HON. GEO. W. McCRARY,
Secretary of War.

SIR: I have the honor to return herewith the accompanying papers, referred to me from your Office, "for remarks," and to submit thereon as follows:

1. These papers relate—*first*—to the question of the amenability to military jurisdiction and trial by court martial of *Superintendents of National Cemeteries*. This question, having been brought up by the Quartermaster General, and referred to this Bureau, I had the honor to recommend, by the within endorsement of November 27th last, that the question be submitted to the Attorney General for opinion, and it was submitted accordingly on Dec. 6th last. I had indeed no doubt myself on the question, nor had my predecessor, Judge Advocate General Holt, who, on Oct. 1873, had given an official opinion to the effect that, in view of the fact that Superintendents of Cemeteries were no part of the army, but civilians, being indeed required to be civilians by positive statute—R. S., Sec. 4874 the only law on the

subject* to hold them amenable to the military jurisdiction in time of peace involved an absurdity. This is certainly my own view; it being further my opinion that the 63d Article of War† refers to, and is operative only in, (as the terms "camp" and "in the field" indicate,) a time of war, i. e., war with a foreign power, or with Indians, or a civil war; and can have no application in time of peace. Sundry other of the Articles of War are applicable only to time of war; and, as to this, or any other, Article or Statute, even if it did *in express terms* assume to extend the military jurisdiction to civilians in time of peace, it would, in my opinion, necessarily be unconstitutional and of no legal effect. In my view, no possible case can arise, in time of peace, where a civilian can legally be made liable to military arrest and trial for a criminal or other offence, and any statute which attempts to render him so amenable must necessarily be wholly void. In time of *war* civilians serving with troops engaged in hostile operations, become, for offences committed upon the theatre of war, amenable under the 63d Article above cited, and indeed independently of it, to the Military jurisdiction. So, during the prevalence of Martial law or Military government, (See Opinion of Chase, C. J., in *In re Milligan*, 4 Wall. 142,) civilians may be made so amenable in partigular cases, though here the exceptional jurisdiction can properly be enforced only with great delicacy and caution. But except in these instances, such a jurisdiction cannot be exercised without, in my judgment, the clearest violation of the Constitution; and to exercise it in fact would be an act of arbitrary power wholly repugnant to the principles upon which our system of government is based.

* "The Superintendent of the national cemeteries shall be selected from meritorious and trustworthy soldiers, either commissioned or enlisted men of the volunteer or regular Army, *who have been honorably mustered out or discharged from the service of the United States*, and who may have been disabled for active field service in the line of duty."

† "All retainers to the camp, and all persons serving with the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders according to the rules and discipline of war."

So obvious to my mind is all this, that, (in view of the terms of Sec. 4874 of the Revised Statutes, in regard to Superintendents of National Cemeteries,) I should never have thought of recommending the reference of the question of their amenability to military trial, to the Attorney General, had it not been for the recent opinion (contained with the accompanying papers) of that official in, (or rather relating to, for the opinion was in terms general,) the case of *Barth*, to which the other papers, herewith returned, refer. It was the existence of this opinion alone that induced such recommendation, and it is the fact alone that it still exists which induces the request with which this communication concludes.

2. *Chas. H. Barth* was a quartermaster's clerk, employed by Lieut. Col. A. R. Eddy, Deputy Quartermaster General, and chief quartermaster of the military Department of California, stationed at San Francisco. Barth was not an officer of the army nor an enlisted man, but a civilian clerk paid out of the annual appropriation for the quartermasters department of the Army. Employed at San Francisco, in time of peace, his *status* was precisely that of any civilian clerk employed at the present time in the War Department at Washington; his only relation to the military service being that he performed labor for the United States in the military branch of the executive department of the government. Barth, having been detected in the forgery of the name of a civilian contractor on checks issued to his order by the United States, through Lieut. Col. Eddy, and in the utterance of these checks when forged, by selling them to a money-broker in San Francisco and getting the money upon them, (as also of the falsification of official papers in violation of Sec. 5438, Rev. Stats.,) was (legally as I hold,) placed in *military arrest* by the order of the Department Commander, General Schofield, and the question was thereupon raised by him whether Barth could legally be tried by a court martial. This Bureau gave its opinion unhesitatingly in the negative, but General Schofield, who took a contrary view, having induced the question to be referred by the Secretary of War to Attorney General Taft, that official, on June 2, 1876, rendered a very brief opinion in which he concurred in the view of Genl. Schofield. This opinion, which in effect held all the clerks—male and female

—of the War Department subject to the military jurisdiction and to trial by court martial, and the principle of which was indeed to hold the Secretary of War, whose relation to the "land forces" is of the most intimate character, as also the President who is commander in chief of the Army, similarly amenable, appeared to me so extraordinary, that, believing it to have been issued through some oversight, I informally requested the Attorney General to reconsider the question passed upon. This he readily consented to do, and—as I have been informed—had done so in part, when he went out of office. His opinion, therefore, of June 2, 1876, remains unrevoked.

[It may be noted here that Barth escaped from the military arrest, and has since been at large. The State Department has recently been requested by the Secretary of War to procure his extradition from the Hawaiian government.]

3. In view of the facts thus detailed, I have the honor to request, and, in view of the importance of the question of constitutional law involved, to urge, that the Secretary of War will renew the reference to the Department of Justice of the question of the amenability to the military jurisdiction of Superintendents of National Cemeteries, originally submitted by the Hon. Secretary to the Attorney General on Dec. 6th last, but on which no opinion has yet been given: And further that he will request at the same time a review of the opinion relating to the case of Barth, and a further opinion therein, in case it should be deemed proper to withdraw the existing one.

By a reference to Secretary Cameron's said communication to the Attorney General of Dec. 6, 1876, it will be seen that he requested in substance that the two cases should be considered together, and an opinion be furnished upon both, in connection and at the same time.

A brief memorandum of authorities upon the question of jurisdiction above indicated is herewith furnished; as also Remarks upon the Argument of Genl. Schofield in the case of Barth.

I have the honor to remain

Very respectfully

Your obt. svt.,

W. M. DUNN,
Judge Advocate General.

MEMO. OF AUTHORITIES

"Under the Constitution of the U. S., (See Amendments—Arts. V & VI), Congress has no power to subject any citizen of a state to trial and punishment by military power in time of peace." Atty. Gen. Hoar, XIII Opinions of Attys. Gen. 63.

In XIV. Opinions, 22-24, Atty. Gen. Williams construes the 63d (then numbered the 60th) Article of War as referring to a time and theatre of war, and holds civil employees serving with the troops in an Indian war, amenable to the military jurisdiction, under this Article. The inference is that employees not so serving, (but serving in time of general peace, and—even if Indian hostilities were going on at the time—at a place not in the "field" but wholly remote from the theatre of any hostilities,) cannot legally be made so amenable.

In *Stuart v. United States*, 18 Wallace, 84, 88, it is held that a contractor for transportation of military stores from post to post "remote from the seat of actual war," was not performing a military service, and was no part of the Army. (And see reference to this case in 10 Ct. of Claims, 419.)

The only adjudicated case known to me in which the jurisdiction of a military court over a civilian clerk or employee is sustained, is that of *Matter of John Thomas*, U. S. Dist. Ct. for the Southern Dist. of Mississippi, 1 Chicago Legal News, 245. Thomas was a clerk to an Army paymaster. I think, of course that the ruling holding him amenable to trial by court martial was entirely unsound, but I believe that it was in a considerable degree influenced by the fact that Mississippi was at the time under a military government, under the Reconstruction Laws, and the party was viewed thus—erroneously as I think—as practically serving in the field.

[The ruling in *U. S. v. Bogart*, 3 Benedict, 257, proceeded on the view that a paymaster's clerk in the Navy was a regular uniformed officer of the Navy, having rank as such, &c., and thus not a civilian at all. This case is therefore not in point.]*

* If it be held that Barth is or was amenable to military jurisdiction and trial, then every clerk in the War Department at Washing-

In General Schofield's argument he refers to the phraseology of the present 60th Article of War—"any person in the Military service of the United States," as if it extended the military jurisdiction to persons other than officers and enlisted men. In my opinion, this phrase is simply to be regarded as a condensed form of expression for the phrase employed in the original Act, (Mch. 2, 1863, ch. 67, sec 1.)—"any person in the land (or naval) forces of the United States, or in the militia in actual service of the United States in time of war." By these words Congress clearly intended the officers and soldiers of the army (including militia when regularly called into the United States service,) and the officers and seamen of the navy. The Commission on the revision of the Statutes were not authorized to change the existing law, but they could condense and simplify, and, in my opinion, this is all that they have done in the present 60th Article; the term now employed being merely a brief form of the more elaborate form, but each being simply a description of the purely military force of the United States, composed of officers and enlisted men. A similar condensation of expression occurs in the corresponding Article of the Naval Code.

I am—further—wholly unable to perceive the bearing, upon the present question, of the "or other person," etc., cited by General Schofield from the clause before the last of the 60th Article. I construe this as making punishable officers or soldiers who may purchase, etc., the articles mentioned from other officers or soldiers, or from any of the class of civil persons commonly employed in connection with armies, as teamsters, officers servants, camp-followers, etc. I consider the provision to have no more significance in reference to the question at issue than if, instead of the expression, "or other person," etc., the Article had said—*or from any civilian*. To illustrate: Suppose an Act of Congress should provide that if a soldier committed an assault

ton, male or female, is so amenable: the same may also be, with equal reason, held of the Secretary of War, whose relations to the land forces are closer than can be those of any clerk in Quartermaster or any other branch of his Department; and may be held also of the President who is commander in chief of the Army!

upon a citizen of the United States, he should be tried by court martial, and punished in a certain way. In my opinion there would be just as much reason for holding that under this Act the citizen could be tried by court martial and punished as prescribed for committing an assault upon the soldier, as for holding that the clause indicated of the 60th Article furnishes any color of authority for the trial by court martial of a civilian clerk situated as was Barth.

I cannot therefore perceive that the Revised Statutes makes any change whatever in the law as to the particular under consideration. But even if they did; even if in a hundred Articles or provisions they in terms authorized the trial of civilians by court martial, such a trial would still be utterly illegal because in contravention of the letter and spirit of the Constitution. The question is thus a constitutional not a statutory one. At the same time I am unable to discover in the Statutes any attempt whatever to contravene the Constitution in this respect.

W. M. DUNN,
Judge Advocate General.

WAR DEPARTMENT,
BUREAU OF MILITARY JUSTICE,

June 16, 1877.

HON. GEO. W. MCCRARY,
Secretary of War.

SIR: I have the honor to return herewith the papers referred to this Bureau in the case of Wm. G. Crafts, and to express the opinion that such case is not within the jurisdiction of a court martial, and that the prisoner is entitled to be immediately released by the military authorities, or committed to the custody of the U. S. Marshal.

This Bureau has always been of opinion that the military jurisdiction cannot legally be extended to a case of a civilian except upon the rare and extraordinary occasion of a state of war or of the existence of martial law, and then only for crimes committed upon the theatre of war or within the scope of such law. The 63d Article of War is deemed to

recognize this principle, in providing that retainers to the *Camp* and persons serving with the *armies in the field*, though not enlisted soldiers, shall be subject to military law; thus evidently limiting such amenability to civil persons serving with troops engaged in actual war, and for offences committed upon its theatre.

The within named civilian, Wm. G. Crafts, was, at the time of his offences, not serving with an army in the field, but was a clerk to an officer acting as quartermaster stationed at a military post, within the limits, not of a Territory but of a State—Nebraska. This post is designated "Camp Robinson," but it is not a camp in a warlike sense, but a permanent station, having been established for at least three years. The locality of the post was not within the theatre of an Indian war; nor were the troops at or near the post engaged in war. The Indians at Red Cloud Agency, near by, were not at war with the United States.

The statement in the papers relied upon as giving the court martial jurisdiction is that—"the troops stationed at that post were "operating 'in the field' in the immediate presence of various bands of "Indians, many of whom were lately from the war path." This statement is a mixture of inference with fact. While it is no doubt true that some of the Indians at the Agency had recently been in hostility with the United States, it is a conclusion only of the writer that the troops stationed at the post were "operating in the field." But if indeed "operating," in the restricted sense of guarding the frontier and holding themselves in readiness to repel any disorder at the Agency, or to march against inimical Indians in the event of war or active hostilities, they were not, in the opinion of this Bureau, so engaged in actual warfare as to authorize courts martial convened at their station to take cognizance of offences committed by civilians there commorant.

It is to be remarked that not only is the right of a civilian to be tried by the civil courts one which cannot constitutionally be infringed upon except under circumstances most clearly and indubitably subjecting him to military law and government, but the theatre of an Indian war is necessarily peculiarly limited, being confined to the locality of the particular tribe or tribes at war with the United States. The

military jurisdiction in a case like the present, is thus to be more cautiously extended than in the case of a general war.

It is further to be observed that even if the jurisdiction of a court martial could legally have been stretched so as to include this case at the date of the alleged offences, March 31, it would be too late to exercise such a jurisdiction now when hostilities with Indians within the Department of the Platte have almost ceased, and a state of war can scarcely be said to exist there except so far as relates to certain distant roving bands. The jurisdiction of a court martial under the 63d Article can, it is held, be exercised only pending the war, during and upon the scene of which the offence was committed.

It is thus the opinion of this Bureau that no sufficient authority is shown for subjecting the civilian named to the exceptional jurisdiction of a military court. His offences—conspiring with contractors, &c, to defraud the United States—were not military ones, but such as are clearly cognizable, under Sec. 5438, Revised Statutes, by the U. S. District Court, which meets at Omaha, (the entire State of Nebraska being included within the judicial district,) on October 10th next. The recommendation of this Bureau would therefore be that the papers in the case be transmitted to the Department of Justice, with the request that the necessary instructions be given for the arrest of the prisoner by the Marshal and his prosecution before said Court.

In view however of the opinion of Attorney General Taft in the case of Barth, of June 2d, 1876, which the Judge Advocate General, believing it to have been inadvertently issued, has heretofore desired the Secretary of War to ask to have reconsidered, it is urged that the Hon. Attorney General be requested to furnish the Secretary of War with an opinion as to whether a court martial may legally assume jurisdiction of the case of the within named civilian clerk, Wm. G. Crafts.

W. M. DUNN:

Judge Advocate General.

APPENDIX D

Significance of Military Trials of Civilians in the 1790's in Terms of Concepts Then Prevailing

What follows below should, logically, have been included in the text; we request that the Court treat the discussion as though contained in a Supplemental Brief filed pursuant to Rule 41(5).

1. One of the apparent mysteries of the military law of the 1790s is why, when the Articles of War then in force vested in Congress the ultimate power to approve sentences in time of peace involving death and sentences extending to the dismissal of an officer, the Commanding Generals of the time, notably Major General Anthony Wayne, ordered such sentences into execution immediately, without any reference whatever to Congress. See 72 Harv. L. Rev. 15.

2. AW 2 of 1786 provided, in pertinent part—

* * * * neither shall any sentence of a general court-martial in time of peace, extending to the loss of life, the dismissal of a commissioned officer, or which shall either in time of peace or war respect a general officer, be carried into execution, until after the whole proceedings shall have been transmitted to the secretary at war, to be laid before Congress for their confirmation or disapproval, and their orders on the case. * * * "

3. By a whole series of acts, beginning in 1789 and extending through 1803, the Continental Articles of War—those of 1776 as amended in 1786—were made to apply to the existing army, and to certain authorized increases in the army's strength. Sec. 4 of the Act of Sept. 29, 1789, c. 25, 1 Stat. 95, 96; Sec. 13 of the Act of Apr. 30, 1790, c. 10, 1 Stat. 119, 121; Secs. 3 and 10 of the Act of Mar. 3, 1791, c. 28, 1 Stat. 222, 223; Sec. 11 of the Act of Mar. 5, 1792, c. 9, 1 Stat. 241, 242; Sec. 4 of the Act of May 9, 1794, c. 24, 1 Stat. 366; Sec. 14 of the Act of Mar. 3, 1795, c. 44.

1 Stat. 430, 432; and see Winthrop *14 (p. 23 and note 43 of the 1920 reprint) for further enactments from 1796 to 1803. On three of the occasions specifically cited, the existing Articles were reenacted "so far as the same are applicable to the constitution of the United States" (*supra*, p. 53).

4. Not until 1796 did the Congress vest in the President the power to act on death and dismissal cases in time of peace, and on general officer cases at all times. Sec. 18 of the Act of May 30, 1796; c. 39, 1 Stat. 483, 485.

5. Yet General Wayne regularly confirmed and ordered executed numerous death sentences, some while still at Pittsburgh in 1792 (e.g., the case of Sgt. Trotter, *supra* p. 50, at note 10), and similarly confirmed the dismissal of numerous officers. E.g., Pittsburgh, July 30, 1792; 34 Mich. Pion. & Hist. Coll. 354; Hobson's Choice, Sept. 10, 1793, *id.* at 475-476; Green Ville, May 6, 1795, *id.* at 608; Green Ville, Nov. 28, 1795; *id.* at 654-657.

6. The foregoing actions were not surreptitiously taken. Writing from Pittsburgh in September 1792, General Wayne advised the War Department of the execution of three death sentences. Secretary Knox replied, "The sentences of the Courts Martial you have confirmed, seemed absolutely necessary—Hereafter it is to be hoped there may be less call for the punishment of death." 1 Knopf, ed., *Campaign into the Wilderness: The Wayne-Knox-Pickering-McHenry Correspondence*, 81, 88, 90. The Secretary frowns at the necessity; he does not question the legality.

7. It may be assumed that the Secretary of War was similarly advised of the execution of sentences to dismissal in officer cases, the effect of which was to create vacancies in the establishment to be filled by promotion or by original appointment; we have not had time to examine this aspect.

8. It cannot be supposed that Secretary Knox was unaware of the terms of AW 2 of 1786, inasmuch as he was Secretary at War under the Confederation when the amend-

ments of May 31, 1786, were adopted by the Continental Congress to replace Section XIV of the 1776 Articles of War. See 30 J. Cont. Cong. 145-146, 316-322. Nor can it be supposed that Secretary Knox tolerated irregularities in military proceedings; to the contrary.

In March 1786, when a death sentence adjudged by a court-martial had been submitted to Congress for its action (Sec. XIV, Art. 8, of 1776), Secretary Knox pointed out that the court-martial had been illegally constituted, and recommended that a court of inquiry be appointed to investigate the matter and that the officer responsible be suspended in the meantime. 30 J. Cont. Cong. 119-121.

And, in the following year, the Secretary recognized that an officer separated from the service after the demobilization of 1783 was thereafter not amenable to military trial. 30 J. Cont. Cong. 666-668.

9. What statutory authority did General Wayne have to order death sentences into execution? Why did Secretary Knox consider his actions legal? On the face of the provisions of law then in force, these were matters to be laid before Congress until 1796, at which time the power to approve death sentences in time of peace was transferred to the President. What is the answer to this tantalizing puzzle?

10. We have searched the definitive edition of the Journals for the Continental Congress for the years 1786-1789, we have thumbed volume 1 of the Statutes at Large up to the time that the confirming power was transferred to the President in May 1796, and we have similarly thumbed vol. 1, American State Papers—Military Affairs for the same period: We have found neither legislative enactment, nor executive directive conferring on the commanding general the powers that were retained by the Congress in AW 2 of 1786. And we have found no discussion of the power to act on court-martial sentences to death or dismissal in the legislative history of the Act of May 30, 1796, *supra*, Section 18 of which transferred that power to the President. 5 Annals of Congress 905-913, 1418-1423, 1427-1430; 2 H. of R. J. 528, 529, 532, 566-570, 572, 573, 581, 583, 590; 2 Sen. J. 245, 248, 252, 263, 265, 267, 278.

11. Plainly, both General Wayne and Secretary Knox considered that the confirming powers exercised by the former in death and dismissal cases were legally exercised. And, on the face of AW 2 of 1786, those powers could only have been legally exercised in time of war. It must follow that both individuals believed that the period 1792 to 1796 *was* a time of war.

12. Contemporaneous documents support that view, particularly when the chronology of the time is borne in mind.

a. Indian wars had in fact been endemic for the first half of the 1790s, from the time that Harmer was defeated, through a similar defeat of his successor St. Clair, through the period of Wayne's preparation, and until Wayne's victory at Fallen Timbers in 1794 was capped by the Indians' submission at Greenville in 1795. See Spaulding, *The United States Army in War and Peace*, 118-121; Upton, *The Military Policy of the United States* (1917 ed.) 77-78, 79-80, 83; Jacobs, *The Beginning of the U. S. Army, 1783-1812*, 40-181.

b. Although the debates on the Act of May 30, 1796, *supra*, "To ascertain and fix the Military Establishment of the United States," are not particularly illuminating, and rehash the hackneyed anti-militarism of the previous decade—e.g., *per* Giles of Virginia, "the very idea of a Military Establishment was to him a disagreeable thing" (5 Annals of Congress 912)—they do reflect the idea that, the Indian war having terminated, there was no more need for a War Establishment, but only for a Peace Establishment. E.g., references at 5 Annals of Congress 906, 908, 909, 913, 1418, to a "Peace Establishment"; and the following: "When the Military Establishment was raised to its present amount, it was an account of an Indian war. That war was now at an end" (909); "if that number was sufficient to carry on war, it was surely not necessary to have an equal number in peace" (910); "It was supposed that a Major General was necessary for a War Establishment, but not for a Peace Establishment" (1421-1422); "They were now upon a Peace Establishment—the last was a War Establishment" (1430).

c. A little earlier, in the House report of March 25, 1796 on "Organization of the Army," there was included a letter from Governor William Blount of the Southwest Territory to the Secretary of War, dated November 2, 1795, which remarked that "Peace now *actually* exists between the United States and the Indian tribes." 1 Am. St. Pap. Mil. Aff. 112 (italics in original).

d. In 1795, Secretary of War Pickering (who had succeeded Knox) felt that a state of war still existed.

This is evidenced by an entry in 1 *Orderly Book of the Corps of Artillerists and Engineers* (MS., U.S.M.A.) 118, 119, dated August 25, 1795, which records a death sentence passed by a court-martial on a deserter who pleaded guilty. Major Tousard, the Commandant, remarking that "The Commandant having maturely compared the Letter of the Secretary of War of the 7th Instant which says that since the Commencement of the Indian War, the United States have been in a situation that exclude the Idea of its being a time of peace," confirmed the sentence—but on the next day postponed its execution. 1 *id.* 120. (A month later, the culprit was pardoned by the President and restored to duty, following which Major Tousard offered an amnesty to similar offenders. 1 *id.* 138, 139.)

13. It was Maitland who "Again and again * * * emphasised the danger of imposing legal concepts of a later date on facts of an earlier date * * *. We must not read either law or history backwards. We must learn to think the thoughts of a past age—the common thoughts of our forefathers about common things." Cam. ed., *Selected Historical Essays of F. W. Maitland* (1957) xi.

14. The conclusion is accordingly inescapable that, by the standards of the 1790s, the years 1792 to 1795 or 1796 were a time of war, and were so regarded by contemporaries. By the later standards of the 1870s, an Indian War on the frontier did not authorize trial by court-martial of civilians in the rear areas. 16 Op. Atty. Gen. 13; 16 *id.* 48; Appendix C, *supra*, pp. 119-127, *passim*. By the standards just pronounced at the last Term (*Lee v. Madigan*, 358 U.S. 228), the 1790s were not a time of war at Pittsburgh or West

Point. But to the men of the 1790s, those years were in their estimation a time of war, throughout the nation and not merely on the actual theater of operations.

15. It follows that, in the minds of those responsible therefor, the trials of civilians by court-martial that appear in the Wayne Orderly Book (Appendix B, *supra* pp. 107-113) represented trials in time of war, and were not considered by them as having taken place in time of peace. Consequently, viewing those trials in their setting, they must be regarded as entirely similar to Washington's courts-martial of civilians during the Revolution (Appendix A, *supra*, pp. 103-105). Therefore the civilian trials of the 1790s, accurately evaluated, cannot fairly be considered as even historical precedents for the peacetime military jurisdiction now asserted by The Pentagon.

16. We request that Point III D, *supra* pp. 36-54, which was written in terms of modern concepts of war and peace, be now read in the light of the present Appendix.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 725

BRUCE WILSON, PETITIONER,

vs.

MAJOR GENERAL JOHN F. BOHLENDER,
COMMANDER, FITZSIMMONS ARMY HOSPITAL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT.

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(File endorsement omitted)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

UNITED STATES OF AMERICA Ex REL
BRUCE WILSON, Fitzsimmons Army Hospital,
Denver, Colorado, *Petitioner*

v.

MAJOR GENERAL JOHN F. BOHLANDER, Commander,
Fitzsimmons Army Hospital, Denver, Colorado, *Respondent*

Petition for Writ of Habeas Corpus—Filed Aug. 20, 1958

The petition of Bruce Wilson shows:

1. The petitioner, Bruce Wilson, was born 54 years ago at Red Bluff, California, and at all times has been and still is a citizen of the United States. At all times relevant hereto, he was a civilian employed as an auditor of the Comptroller Division of the Army, Berlin Command, and not a member of the Armed Forces of the United States.

2. The petitioner is currently held, pursuant to military orders and by direction of military authorities at the Fitzsimmons Army Hospital, Denver, Colorado, and under the jurisdiction of the United States.

3. Heretofore, purporting to act under the authority of Article 2 (11) of the Uniform Code of Military Justice (50 USC sec. 522 (11)), the United States Army caused petitioner to be tried by a general court-martial of the U. S. Army convened at Berlin, Germany, on charges of sodomy and of conduct prejudicial to good order and discipline in the Armed Forces in violation of Articles 125 and 134 of the Uniform Code of Military Justice (50 USC sec. 719 and 728.)

4. Petitioner was so tried and on or about 21 August 1956 was sentenced to ten years at hard labor which the Convening Authority reduced to five (5) years.

5. Since on or about 21 August 1956, the petitioner has at all times been detained and confined under the jurisdic-

tion of the U. S. Army; for a period of time at the Usareur Stockade, Mannheim, Germany; Fort Jay, Governor's Island, New York; Branch United States Disciplinary Barracks, New Cumberland, Pennsylvania; Valley Forge Army Hospital, Pennsylvania; and is presently confined at Fitzsimmons Army Hospital, Denver, Colorado.

6. Petitioner's arrest, detention and confinement by the United States military authorities has at all times been and still is unlawful and in violation of the Constitution of the United States. As an American citizen and a civilian, your petitioner could not be constitutionally tried by court-martial. Only a Court constituted under Article III of the Constitution, giving the safeguards of the Bill of Rights, especially Amendments V and VI, has jurisdiction to try him.

2 7. ~~The persons exercising custody and restraint of~~
petitioner are subordinate to, and under the direction of, respondent.

8. A petition for a Writ of Habeas Corpus was filed in the United States District Court for the District of Columbia but was dismissed on grounds of lack of jurisdiction because the petitioner was not confined within the territorial limits of the District of Columbia. (Habeas Corpus #21-58).

WHEREFORE, petitioner prays that a Writ of Habeas Corpus be granted and issued, directed to respondent, commanding him to produce the body of petitioner before the Court at a time and place therein to be specified, then and there to receive and do what the Court shall order concerning the detention and restraint of petitioner, and that petitioner be ordered discharged from the detention and restraint aforesaid; and for such other relief as to the Court may seem just and proper.

ARTHUR JOHN KEEFFE
Arthur John Keefe, Esq.
GEORGE P. NOUMAIR
George J. Noumair, Esq.

Attorneys for Petitioner

HOLLAND & HART

By JAY W. TRACEY, JR.
Jay W. Tracey, Jr.

7

Attorneys for Petitioner.
520 Equitable Building;
Denver 2, Colorado,
AMherst 6-1461.

United States of America }
District of Columbia } ss.
City of Washington }

Sworn to before me this 5th day of June, 1958.

BRUCE WILSON
Petitioner

MARY JO FREEHILL
Notary Public

(Seal)

My Commission expires Apr. 14, 1960.

STATE OF COLORADO }
COUNTY OF ADAMS }
FITZSIMONS ARMY HOSPITAL }

Sworn and subscribed to before me by BRUCE WILSON this
20th day of August, 1958.

GENELIA O'GARA
Notary Public

(Seal)

My Commission expires March 17, 1962.

3 STATE OF COLORADO }
COUNTY OF ADAMS } ss.
FITZSIMONS ARMY HOSPITAL }

I, BRUCE WILSON, being first duly sworn, say that I am the
Petitioner by whom the foregoing Petition is subscribed,
that I have read the same and that the facts set forth
therein are true to the best of my own knowledge and
belief.

BRUCE WILSON
Bruce Wilson

Subscribed and sworn to before me this 20th day of August, 1958.

(Seal)

GENELJA O'GARA
Notary Public

My Commission expires March 17, 1962.

(File Endorsement Omitted)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

THE UNITED STATES OF AMERICA, EX REL., BRUCE WILSON,
Petitioner.

v.

MAJOR GENERAL JOHN F. BOHLANDER, Commander,
Fitzsimons Army Hospital, Denver, Colorado,
Respondent.

**Return of Respondent to Order to Show Cause—
Filed Aug. 25, 1958**

COMES NOW the respondent in the above-entitled action, upon whom has been served an order to show cause why a writ of habeas corpus should not issue for the production of the petitioner, and by his attorney, JOHN S. PFEIFFER, Assistant United States Attorney for the District of Colorado, making return to the said order, respectfully shows unto the court that he holds the said petitioner by authority of the United States as a prisoner in the custody of the Department of the Army, pursuant to a sentence of a General Court-Martial under the following circumstances:

1. That said petitioner was serving with, employed by and accompanying the Armed Forces without the continental limits of the United States during the years 1955 and 1956.

2. That on August 21, 1956, said petitioner was charged and convicted of three acts of sodomy, in violation of Article 125, Uniform Code of Military Justice, 50 USC, Section 719; that he was further convicted of two charges of lewd and lascivious acts with persons under the age of

sixteen, in violation of Article 134, Uniform Code of Military Justice, 50 USC, Section 728; that he was further convicted of two charges of displaying lewd and filthy pictures to minors with intent to arouse their sexual desires, in violation of Article 134, Uniform Code of Military Justice, 50 USC, Section 728; that the General Court Martial sentenced the petitioner to confinement at hard labor for a period of ten years; that on August 23, 1956, the convening authority approved the conviction and reduced the sentence to five years at hard labor and directed that the petitioner be confined to the Branch United States Disciplinary Barracks, New Cumberland, Pennsylvania, pursuant to General Court Martial Order No. 16, Headquarters, Berlin Command, U. S. Army, a copy of which is hereto appended.

3. That the conviction was affirmed by the United States Court of Military Appeals on March 28, 1958—*United States v. Wilson*, 8, USCMA 60, 25 CMR 322.

4. That on April 18, 1958, the petitioner was transported to Fitzsimons Army Hospital for purposes of hospitalization and treatment, pursuant to Special Order No. 77, a copy of which is hereto appended.

WHEREFORE, for the reasons hereinabove set forth, the respondent respectfully prays that the court discharge the order to show cause and dismiss the petition for said writ of habeas corpus.

JOHN S. PFEIFFER,

John S. Pfeiffer,

*Assistant United States Attorney
for the District of Colorado
Attorney for Respondent.*

JSP:fsm

General Court-Martial Orders No. 16

General Court-Martial
Order Number 16

Headquarters
Berlin Command
APO 742, US Army
23 August 1956

Before a General Court-Martial which convened at Berlin, Germany, pursuant to paragraph 1, Special Orders Nr 147, this headquarters, dated 26 June 1956, was arraigned and tried:

GS-11 Bruce Wilson, Department of the Army civilian employee.

CHARGE I: Violation of the Uniform Code of Military Justice, Article 134

Specification 1: In that Bruce Wilson, a person serving with, employed by, and accompanying the armed forces without the continental limits of the United States in Berlin, Germany, did, at Berlin, Germany, during the month of December 1955, commit a lewd and lascivious act with Joseph R. Szocinski, a male under sixteen years of age, by placing Joseph R. Szocinski's penis in his mouth, with intent to gratify the sexual desires of the said Bruce Wilson.

Specification 2: In that Bruce Wilson, a person serving with, employed by, and accompanying the armed forces without the continental limits of the United States in Berlin, Germany, did, at Berlin, Germany, during the month of March or April 1956, commit a lewd and lascivious act with Charles F. Messer, Jr., a male under sixteen years of age, by placing Charles F. Messer, Jr's penis in his mouth, with intent to gratify the sexual desires of the said Bruce Wilson.

CHARGE II: Violation of the Uniform Code of Military Justice, Article 125

Specification 1: In that Bruce Wilson, a person serving with, employed by, and accompanying the armed forces without the continental limits of the United States in

Berlin, Germany, did, at Berlin, Germany, during the month of June 1956, commit sodomy with Private First Class Samuel W. Sloan.

Specification 2: In that Bruce Wilson, a person serving with, employed by, and accompanying the armed forces without the continental limits of the United States in Berlin, Germany, did, at Berlin, Germany, during the month of May 1956, commit sodomy with Private First Class William C. Frederick.

Specification 3: In that Bruce Wilson, a person serving with, employed by, and accompanying the armed forces without the continental limits of the United States in Berlin, Germany, did, at Berlin, Germany, during the month of June 1956, commit sodomy with Private-2 Marvin W. Warnack.

ADDITIONAL CHARGE: Violation of the Uniform Code of
Military Justice, Article 134

Specification 1: In that Bruce Wilson, a person serving with, employed by, and accompanying the armed forces without the continental limits of the United States in Berlin, Germany, did, at Berlin, Germany, from on or about 21 April 1956 to on or about 20 June 1956, wrongfully and unlawfully show obscene, lewd and filthy pictures and photographs to Robert C. Vick, a minor, with the intent of arousing the passions and sexual desires of the said Robert C. Vick.

Specification 2: In that Bruce Wilson, a person serving with, employed by, and accompanying the armed forces without the continental limits of the United States in Berlin, Germany, did, at Berlin, Germany, from on or about 1 December 1955 to on or about 20 June 1956, wrongfully and unlawfully show obscene, lewd and filthy pictures and photographs to Ashton L. Norton, a minor, with the intent of arousing the passions and sexual desires of the said Ashton L. Norton.

7

PLEAS

To all Specifications and Charges: Guilty

FINDINGS

Of all the specifications and Charges: Guilty

SENTENCE

To be confined at hard labor for ten years. (No previous convictions considered.)

The sentence was adjudged on 21 August 1956.

ACTION

HEADQUARTERS

BERLIN COMMAND

(7781).

Office of the Commanding General

APO 742 US ARMY

23 August 1956

In the foregoing case of Bruce Wilson, a person serving with, employed by, and accompanying the armed forces without the continental limits of the United States in Berlin, Germany, only so much of the sentence as provides for confinement at hard labor for five years is approved. The record of trial is forwarded to The Judge Advocate General of the Army for review by a board of review. A United States penitentiary, reformatory, or other such institution is designated as the place of confinement. However, the prisoner will be temporarily confined in the Branch United States Disciplinary Barracks, New Cumberland, Pennsylvania, pending the designation of a Federal institution by the Attorney General. At such time, the prisoner will be committed to the designated Federal institution and the confinement served therein, or elsewhere as competent authority may direct.

S. HUGH P. HARRIS

t. Hugh P. Harris

Major General, USA

Commanding

For the Commander:

O. M. BARSANTI

Colonel, GS

Chief of Staff

Official:

E. M. Gilroy

E. M. Gilroy

Lt. Col. AGC

Adjutant General

Distribution:

- 5—TAG, Dept of the Army, Wash 25, DC (Attn: AGPF)
- 1—CO, Branch United States Disciplinary Barracks
New Cumberland, Pa.
- 6—CinC, USAREUR (Attn: Mil Justice Sec, JA Div),
APO 403, US Army
- 1—CG, Berlin Command (7781), APO 742, US Army
- 30—SJA, Berlin Command (7781), APO 742, US Army
- 1—Finance Officer, Berlin Command (7781), APO 742,
US Army
- 2—AG Records, Berlin Command (7781), APO 742, US
Army
- 3—AG Pers, Berlin Command (7781), APO 742, US
Army
- 1—PM, Berlin Command (7781), APO 742, US Army
- 1—The Comptroller, Berlin Command (7781), APO 742,
US Army
- 1—Lt Col F X Bradley, 6th Inf Regt, APO 742, US
Army
- 1—Conf Officer, Berlin Command Prov Guardhouse,
APO 742, US Army
- 5—CO, USAREUR Military Prison, APO 166, US
Army
- 1—Bruce Wilson, GS 11 Dept of the Army Civ, Berlin
Command Prov Guardhouse, APO 742, US Army

8

Extract from Special Orders No. 77

For immediate delivery

NOTE: For explanation of symbols and abbreviations see
AR 320-50 w. C2.

HEADQUARTERS
VALLEY FORGE ARMY HOSPITAL
Phoenixville, Pennsylvania

EXTRACT

18 April 1958

Special Orders
Number 77

13. Par. 10 SO 75 this Hq es pert to trf of Bruce Wilson (former DAC, non-military prisoner of the Department of the Army) (AGO=A 40793) to Fitzsimons Aft Denver, Colo is amended to add: "*for further abuse, trmt & dispo thereof.*" AUTH: ASMRO 19871 dtd 14 Apr 58.

For the Commander:

R. F. SCHALLER

Major, MSC

Adjutant

Official:

LEO A. GODLEWSKI

Leo A. Godlewski

CWO, W-2, USA

1st Adjutant

Distribution: AA,BB,CC,DD,EE,GG.

Special Distribution: Ref par 8-1 cy Off Tng Br

Ref par 7-10 cy Sfc Bennett (del CO MHD)

10

General Court-Martial Orders No. 300

HEADQUARTERS

BRANCH UNITED STATES DISCIPLINARY BARRACKS

New Cumberland, Pennsylvania

General Court-Martial

8 May 1958

Order Number 300

In the general court-martial case of GS-11, Bruce Wilson, Branch United States Disciplinary Barracks, New Cumberland, Pennsylvania (formerly a Department of the Army Civilian employee), the sentence, as approved by the convening authority, to confinement at hard labor for five (5) years, adjudged 21 August 1956, as promulgated in General Court-Martial Order Number 16, Headquarters, Berlin Command (7781), APO 742, U. S. Army, dated 23 August, 1956, has been affirmed pursuant to Article 66 and 67. The provisions of Article 71c having been complied with, the sentence will be duly executed. A United States Penitentiary, reformatory, or other such institution is

designated as the place of confinement. However, the prisoner will be temporarily confined in the Branch United States Disciplinary Barracks, New Cumberland, Pennsylvania, in accordance with the provisions of Paragraph 4b (4), AR 633-5, or elsewhere as competent authority may direct.

By Order of COLONEL SALLEE:

Official:

WALTER F. JUNKINS

Captain, MPC

Adjutant

G. S. BREWER

CHQ, W-2 USA

Asst Adjutant

(CM 392423)

Distribution:

(Par 9f, GAR 22-10)

Signature

Date Notified

11

Extract from Special Orders No. 80

HEADQUARTERS

BRANCH UNITED STATES DISCIPLINARY BARRACKS

New Cumberland, Pennsylvania

Special Orders

8 May 1958

Number 80

EXTRACT

2. The design place of conf in case of Prisoner BRUCE WILSON, RN25818 (DA Civ), presently abs sk Fitzsimmons Army Hosp Denver, Colo., is changed from Br USDB, New Cumberland, Pa to Br USDB, Lompoc, Cal *off 12 May 58*. AUTH: AR 633-5 and Msg PHIGK-S, PHG DA dtd 5 May 58.

For the Commandant:

WALTER F. JUNKINS

Captain, MPC

Adjutant

Official:

G. S. BREWER

CHQ, W-2 USA

Asst Adjutant

12

12

Petitioner's Exhibit 1
Accused's Copy

13

Extract from Special Orders No. 36

HEADQUARTERS

HEADQUARTERS AREA COMMAND

United States Army Garrison, Headquarters Area,
Germany APO 333, US Army

Special Orders
Number 36

18 February 1958

EXTRACT

1. PAC MCM 1951, par 97d, Ltr JAGJ 1954 4164, 20 Apr 1954 and in conformance with par 4b, AR 618-95, 22 Oct 1957, in the General Court Martial case of GS 11 Bruce Wilson, Department of the Army Civilian employee promulgated in GCMO Number 16, 23 Aug 1956, Headquarters Berlin Command, APO 742 and corrected by GCMO Number 19, 30 Aug 1956, Headquarters Berlin Command, APO 742, the previously designated temporary place of confinement, namely USAREUR Stockade, Mannheim, Germany, is changed and the prisoner will be confined in the US Disciplinary Barracks, New Cumberland, Pennsylvania or elsewhere as competent authority may direct, pending completion of appellate review.

For the Commander:

JAMES A. PARKER
Major, AGC
Adjutant

Official:

C. R. LUCAS
C. R. Lucas
Major, Artg
Asst. Adjutant

Distribution:

- 1—TAG, DA, Wash 25, D.C., Attn: AGPF
- 2—TPMG, DA Wash 25, D.C.
- 25—JA Div HACOM, (Includes 10 cys for TJAG, DA Wash 25, DC)

- 1—Bruce Wilson, USAREUR Stockade, APO 166, US Army
- 25—Confinement Officer, USAREUR Stockade, APO 166, US Army
- 1—JA Div. Hq. USAREUR, APO 403, US Army
- 1—HACOM Fin & Acctg Office, APO 333, US Army
- 5—CG, Berlin Command, APO 742, US Army, Attn: SJA
- 2—Central Files, HACOM
- 2—Central Finance & Acctg Office, USAREUR, APO 403, US Army
- 2—HACOM Civilian Personnel Division

14

General Court-Martial Orders No. 19

Corrected Copy
General Court-Martial
Order Number 19.

Headquarters
Berlin Command (7781)
APO 742, US Army
30 August 1956

In the general court-martial case of GS 11 Bruce Wilson, Department of the Army, civilian employee, promulgated in General Court-Martial Order Nr. 16, this headquarters, dated 23 August 1956, the place of confinement designated as a United States penitentiary, reformatory, or other such institution, is redesignated as the *United States Army, Europe, Stockade, Mannheim, Germany*, pending completion of appellate review.

For the Commander:

(SAL)

O. M. BARSANTI
Colonel, GS
Chief of Staff

Official:

E. M. Gilroy
E. M. Gilroy
Lt Col, AGC
Adjutant General

Distribution:

- 5—TAG, Dept of the Army, Wash 25, DC (Attn: AGPF)
- 1—CO, Branch United States Disciplinary Barracks, New Cumberland, Pa.
- 6—CinC, USAREUR (Attn: Mil Justice Sec, JA Div), APO 403, US Army
- 1—CG, Berlin Command (7781), APO 742, US Army
- 30—SJA, Berlin Command (7781), APO 742, US Army
- 1—Finance Officer, Berlin Command (7781), APO 742, US Army
- 2—AG Records, Berlin Command (7781), APO 742, US Army
- 3—AG Pers, Berlin Command (7781), APO 742, US Army
- 1—PM, Berlin Command (7781), APO 742, US Army
- 1—The Comptroller, Berlin Command (7781), APO 742, US Army
- 1—Lt Col F X Bradley, 6th Inf Regt, APO 742, US Army
- 1—Confinement Officer, Berlin Command Provisional Guardhouse, APO 742, US Army
- 5—CO, USAREUR Stockade, APO 166, US Army
- 1—Bruce Wilson, GS-11 Dept of the Army Civ, USAREUR Stockade, APO 166, US Army

General Court-Martial Orders No. 19

General Court-Martial
Order Number 19

Headquarters
Berlin Command (7781)
APO 742, US Army
30 August 1956

In the general court-martial case of GS-11 Bruce Wilson, Department of the Army civilian employee, promulgated in General Court-Martial Order No. 18, this headquarters, dated 23 August 1956, the place of confinement designated as a United States penitentiary, reformatory, or other such institution, is redesignated as the Branch

United States Disciplinary Barracks, New Cumberland,
Pennsylvania, pending completion of appellate review.

For the Commander:

(SEAL)

O. M. BARSANTI

Colonel, GS

Chief of Staff

Official:

E. M. GILROY

E. M. Gilroy

Lt Col, AGC

Adjutant General

Distribution:

5—TAG, Dept of the Army, Wash 25, DC (Attn: AGPF)

1—CO, Branch United States Disciplinary Barracks,
New Cumberland, Pa.

6—CinC, USAREUR (Attn: Mil Justice Sec, JA Div),
APO 403, US Army

1—CG, Berlin Command (7781), APO 742, US Army

30—SJA, Berlin Command (7781), APO 742, US Army

1—Finance Officer, Berlin Command (7781), APO 742,
US Army

2—AG Records, Berlin Command (7781), APO 742, US
Army

3—AG Pers, Berlin Command (7781), APO 742, US
Army

1—PM, Berlin Command (7781), APO 742, US Army

1—The Comptroller, Berlin Command (7781), APO 742,
US Army

1—Lt Col F X Bradley, 6th Inf Regt, APO 742, US
Army

1—Conf Officer, Berlin Command Prov Guardhouse,
APO 742, US Army

5—CO, USAREUR Military Prison, APO 166, US
Army

1—Bruce Wilson, GS-11 Dept of the Army Civ,
USAREUR Military Prison, APO 166, US Army

16

16

Extract from Special Orders No. 147

Proceedings of a General Court-Martial which met (at) Berlin, Germany, at 0935 hours, 21 August 1956, pursuant to the following orders:

HEADQUARTERS
BERLIN COMMAND
(7781)
APO 742 US Army

Special Orders
Number 147

26 June 1956

EXTRACT

1. Pursuant to authority contained in Section I, General Orders 102 Department of the Army, 21 Nov 52, a general court-martial is hereby ordered to convene at Berlin, Germany, at 0800 hours on 27 Jun 56, or as soon thereafter as practicable, for the trial of such persons as may properly be brought before it. The court will be constituted as follows:

For the Commander:

(SEAL)

J. M. WILLIAMSON
Colonel, GS
Act Chief of Staff

Official:

E. M. GILROY
Lt Col, AGC
Adjutant General

17 • Para 1, SO 147, Hq Berlin Command (7781)

Distr:

- 25—SJA Div
- 1—Ea Member
- 1—CO, Hq & Hq Co Berlin Sta Com (7781)
- 1—CO, Sig Co Berlin Sta Com (7781)
- 1—CO, Svc Co Berlin Sta Com (7781)
- 5—CO, 279 Sta Hosp
- 1—CO, 6th Inf Regt
- 5—AG (10—Mil Pers
- 20—Orders)

Record of Trial

PERSONS PRESENT

Maj Paul G. Tobin
 Lt Col Francis X. Bradley
 Lt Col Horace L. Jennerson
 Lt Col Robert O. English
 Lt Col Thomas J. Cleary, Jr.
 Lt Col Theodore Kaftter
 Lt Col Louis R. Buckner
 Maj Harold L. Ramsey
 1st Lt Zane E. Finkelstein
 Capt Melburn N. Washburn

PERSONS ABSENT

Maj Hasty W. Riddle
 Maj Edward J. Maltese
 1st Lt Raymond Lesinski
 2d Lt Robert H. Daine
 1st Lt Aldon L. Carson
 1st Lt John E. Day, Jr.

The following named accused was present:

BRUCE WILSON, AGO A-407 943, GS-11, Department
 of the Army Civilian, Comptroller Division, Berlin
 Command (7781)

The appointed reporter, Jean P. Webb was sworn.

19 TC: The legal qualifications of all members of the prosecution are correctly stated in the appointing orders.

No member of the prosecution named in the appointing orders has acted as investigating officer, law officer, court member, or as a member of the defense in this case, or as counsel for the accused at a pretrial investigation or other proceedings involving the same general matter.

By whom will the accused be defended?

DC: The accused will be defended by Captain Washburn as associate counsel; he expressly consents to the absence of Lieutenants Carson and Day; and introduces as individual counsel Dr. Arthur Brandt who is a member of

the Bar of the State of Massachusetts and the Federal Bar of New York.

TC: Will counsel representing the accused state whether the legal qualifications of the appointed members of the defense are other than as stated in the appointing orders and will individual counsel state whether he has been certified as counsel by an appropriate Judge Advocate General?

DC: The qualifications of appointed members of the defense are correctly stated and the individual counsel is not certified.

TC: Has any member of the defense, including individual counsel, acted as the accuser, a member of the prosecution, investigating officer, law officer, or member of the court in this case?

DC: No member has so acted.

LO: It appears that counsel for both sides have the requisite qualifications.

Proceed to convene the court.

TC: The court will be sworn.

The members of the court, the law officer, and the personnel of the prosecution and defense were sworn.

LO: The court is now convened.

TC: The general nature of the charges in this case is two specifications of lewd and lascivious acts with males under sixteen years of age and three acts of sodomy with enlisted men in the Berlin Garrison, in violation of Articles 134 and 125 respectively; and of the Additional Charge two specifications of displaying lewd and obscene photographs to two different minors, with intent to arouse the passion of the minors, in violation of Article 134 of the

Uniform Code of Military Justice. The charges were preferred by Lieutenant Colonel Hammonds, and the additional charge was preferred by Chief Warrant Officer William J. Austry; forwarded with recommendations as to disposition by Lieutenant Colonel Quinlan; and investigated by Major Bell. Neither the law officer nor any member of the court will be a witness for the prosecution.

The records of this case disclose no grounds for challenge.

If any member of the court or the law officer is aware of any facts which he believes may be a ground for challenge

by either side against him, he should now state such facts.

LO: Apparently there are none.

TC: The prosecution has no challenges for cause and the prosecutive has no peremptory challenge.

Does the accused desire to challenge any member of the court or the law officer for cause?

DC: He does not.

TC: Does the accused wish to exercise his right to one peremptory challenge against any member?

DC: He does not.

21 CHARGE I. Violation of the Uniform Code of Military Justice, Article 134

Specification 1: In that Bruce Wilson, a person serving with, employed by, and accompanying the armed forces without the continental limits of the United States in Berlin, Germany, did, at Berlin, Germany, during the month of December 1955, commit a lewd and lascivious act with Joseph R. Szociński, a male under sixteen years of age, by placing Joseph R. Szociński's penis in his mouth, with intent to gratify the sexual desires of the said Bruce Wilson.

Specification 2: In that Bruce Wilson, a person serving with, employed by, and accompanying the armed forces without the continental limits of the United States in Berlin, Germany, did, at Berlin, Germany, during the month of March or April 1956, commit a lewd and lascivious act with Charles F. Messer, Jr., a male under sixteen years of age, by placing Charles F. Messer, Jr.'s penis in his mouth, with intent to gratify the sexual desires of the said Bruce Wilson.

CHARGE II. Violation of the Uniform Code of Military Justice, Article 125

Specification 1: In that Bruce Wilson, a person serving with, employed by, and accompanying the armed forces without the continental limits of the United States in Berlin, Germany, did, at Berlin, Germany, during the month of June 1956, commit sodomy with Private First Class Samuel W. Sloan.

Specification 2: In that Bruce Wilson, a person serving with, employed by, and accompanying the armed forces

without the continental limits of the United States in Berlin, Germany, did, at Berlin, Germany, during the month of May 1956, commit sodomy with Private First Class William C. Frederick.

Specification 3: In that Bruce Wilson, a person serving with, employed by, and accompanying the armed forces without the continental limits of the United States in Berlin, Germany, did, at Berlin, Germany, during the month of June 1956, commit sodomy with Private-2 Marvin W. Warnack.

22 Typed Signature of Accuser—Vernon Hammonds
Rank—Lt Col, MPC
Organization—Provost Marshal, Berlin Command (7781)

AFFIDAVIT

Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above-named accuser, this 25 day of June, 1956, and signed the foregoing charges and specifications under oath that he is a person subject to the Uniform Code of Military Justice, and that he either has personal knowledge of or has investigated the matters set forth therein, and that the same are true in fact, to the best of his knowledge and belief.

E F Starr
(Type signature)

*Officer administering oath must
be a commissioned officer.*

Major, AGC, Adjutant General
Division Berlin Command (7781)
(Rank and organization of
officer administering oath)

Assistant Adjutant General
(Official character, as Adjutant,
Summary Court, etc. See paragraph 29c, MCM, 1951, and
articles 30a and 136.)

1st INDORSEMENT

Headquarters Berlin Command (7781)

(Designation of command of convening authority)

Berlin, German

(Place)

3 July 1956

(Date)

Referred for trial to the general court-martial appointed by paragraph 1, Special Orders No. 147, Headquarters Berlin Command, 26 June 1956, subject to the following instructions: To be tried with the additional charges, dated 27 June 1956

For the Commander:

(Command or order)

FRANCIS HUME

Capt, AGC Asst Adj Gen

(Typed signature, rank, and
official capacity of officer
signing)

23 Additional Charge: Violation of the Uniform Code
of Military Justice 134

Specification 1: In that Bruce Wilson, a person serving with, employed by, and accompanying the armed forces without the continental limits of the United States in Berlin, Germany, did, at Berlin, Germany, from on or about 21 April 1956 to on or about 20 June 1956, wrongfully and unlawfully show obscene, lewd and filthy pictures and photographs to Robert C. Vick, a minor, with the intent of arousing the passions and sexual desires of the said Robert C. Vick.

Specification 2: In that Bruce Wilson, a person serving with, employed by, and accompanying the armed forces without the continental limits of the United States in Berlin, Germany, did, at Berlin, Germany, from on or about 1 December 1955 to on or about 20 June 1956, wrongfully and unlawfully show obscene, lewd and filthy pictures and photographs to Ashton L. Norton, a minor, with

the intent of arousing the passions and sexual desires of the said Ashton L. Norton.

24 Typed Signature of Accuser—William J. Autry
Rank—CWO

Organization—11th MP Det (CI)

AFFIDAVIT

Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above-named accuser this 27 day of June, 1956, and signed the foregoing charges and specifications under oath that he is a person subject to the Uniform Code of Military Justice, and that he either has personal knowledge of or has investigated the matters set forth therein, and that the same are true in fact, to the best of his knowledge and belief.

E F Starr

(Typed signature)

*Officer administering oath must
be a commissioned officer.*

E. F. STARR,

Major, Hq Berlin Command

(Rank and organization of officer
administering oath)

Assistant Adjutant General

(Official character, as Adjutant,
Summary Court, etc. See para-
graph 29a, MCM, 1951, and
articles 30a and 136.)

1st INDORSEMENT

Headquarters Berlin Command (7781)
(Designation of command of convening authority)

Berlin, Germany
(Place)

3 July 1956
(date)

Referred for trial to the general court-martial appointed by Special Orders No. 147, Headquarters Berlin Command; 26 June 1956, subject to the following instructions: To be tried with the original charges, dated 25 June 1956.

For the Commander:

(Command or order)

FRANCIS HUME,
Capt, AGC Asst Adj Gen
(Typed signature, rank,
and official capacity of officer
signing)

25 TC: With the consent of the accused I shall omit the reading of the charges, a copy of which is before each member of the court, the law officer, and the accused. The charges are signed by Lieutenant Colonel Hammonds and the additional charge is signed by Chief Warrant Officer William J. Autry, persons subject to the code, as accusers; are properly sworn to before an officer of the armed forces authorized to administer oaths; and are properly referred to this court for trial by Major General Harris, the convening authority. The charges and specifications and the additional charge and its specifications, the names and descriptions of the accusers, their affidavits, and the reference for trial will be copied verbatim into the record.

DC: The accused consents.

LO: The reading of the charges may be omitted. The charges and the additional charge were served on the accused by me on 3 July 1956.

Mr. Wilson, how do you plead?

Before receiving your pleas, I advise you that any motions to dismiss any charge or to grant other relief should be made at this time.

DC: Before entering a plea the defense requests a hearing with the law officer outside the hearing of the court.

LO: Without asking the nature of the request or the reason for the request—

IDC: The objection will be lack of jurisdiction.

LO: With the indulgence of the court I will hear, in the absence of the court, your arguments.

President: The court will be closed.

The court recessed at 0945 hours, 21 August 1956.

The court opened at 1020 hours, 21 August 1956.

President: The court will come to order.

TC: Let the record reflect that all parties to the proceedings who were present at the time the court recessed are again present in court.

LO: Proceed.

TC: Mr. Wilson, do you have other motions to make?

DC: He does not.

26 TC: Mr. Wilson, how do you plead?

IDC: On behalf of the accused the defense wishes to enter a plea of guilty as charged.

LO: Mr. Wilson, you have pleaded guilty to all Specifications and Charges. By so doing, you have admitted every act and every element of the offenses charged. Your plea subjects you to a finding of guilty without further proof of the offenses charged, and in that event you may be sentenced by the court to the maximum punishment authorized for the offenses. You are legally entitled to plead not guilty and place the burden on the prosecution of proving your guilt of the offenses. Your plea will not be accepted unless you understand the meaning and effect of that plea. Do you understand what I am talking about?

Accused: Yes sir.

LO: And understanding this, do you persist in your plea of guilty?

Accused: Yes sir.

TC: The prosecution has no legal authorities to present to the court.

Does the defense desire to present legal authorities at this time?

DC: The defense does not.

TC: Prosecution has no opening statement and in light of the plea of the accused the prosecution will present no evidence.

The prosecution rests.

DC: The defense has no opening statement.

The accused has been advised of his right to testify on the merits of the case and has elected to remain silent. Would the law officer care to further advise him?

LO: Yes, I would like to advise the accused of his testimonial rights on the merits.

Mr. Wilson, as the accused in this case you have these rights:

First, you may be sworn and take the stand as a witness. If you do that, whatever you say will be considered and weighed as evidence by the court just as is the testimony of other witnesses, and you may be cross-examined on your testimony by the trial counsel and the court. If your testimony should concern less than all of the offenses charged against you and you do not desire to or do not testify concerning the others, then you may be questioned about the whole subject of the offenses concerning which you do testify but you will not be questioned about any offenses concerning which you do not testify.

Secondly, you may, if you wish, elect to remain silent, that is say nothing at all. If you do this, and you may if you wish, the fact that you do not take the witness stand will not count against you in any way with the court. It will not be considered as an admission that you are guilty, nor can it be commented upon by the trial counsel when addressing the court.

Do you understand what I have said?

Accused: Yes sir.

LO: All right then, I want you to again talk over your decision with your counsel and then tell the court what you desire to do.

Accused: Sir, I wish to remain silent.

LO: All right.

DC: Defense rests.

TC: The prosecution has no further evidence to offer. Does the defense have any further evidence to offer?

DC: The defense has nothing further.

LO: Mr. Wilson's plea subjects him to a finding of guilty without further proof. With your permission the court will be closed.

President: Does any member of the court have any requests for further instructions from the law officer?

Lt. Col. Cleary: I would like to ask a question.

LO: Yes sir.

Lt. Col. Cleary: Is it our duty now to rule upon a plea of guilty or not guilty despite the acceptance?

LO: That is correct, sir. You must find—you close and vote on your findings of guilty or not guilty.

President: Any other questions?

The court will be closed.

28 The court closed at 1025 hours, 21 August 1956.

The court opened at 1035 hours, 21 August 1956.

President: The court will come to order.

TC: Let the record reflect that all parties to the proceedings who were present at the time the court closed are again present in court.

President: Bruce Wilson, it is my duty as president of this court to inform you that the court in closed session and upon secret written ballot, two-thirds of the members present at the time the vote was taken concurring in each finding of guilty, finds you:

Of all the Specifications and Charges: Guilty

LO: The court will now hear the personal data concerning the accused shown on the charge sheet, and will receive evidence of previous convictions, if any.

TC: Page 1 of the charge sheet discloses the following information concerning the accused:

Place: Berlin Germany Date: 25 June 1956

Accused: Wilson, Bruce (NMI)

Service Number: AGO A-407 943

Grade: GS 11, Department of the Army Civilian

Organization and Armed Force: Comptroller Division
Berlin Command (7781)

(employed by Department of the Army)

Date of Birth: 18 March 1904

Contribution to Family or Quarters Allowance: N/A

Pay Per Annum: Basic—\$6,820.00; Sea or Foreign Duty—

Total—\$6,820.00

Record of Service

Initial Date of Current Service: N/A

Term of Current Service:—

Prior Service: Employed as Department of the Army
Civilian 9 years, 5 months.

Data As To Restraint

Nature of any Restraint of Accused: Confinement

Date: 22 June 1956

Location: Confinement Ward, US Army Hospital, Berlin,
Germany

TC: Are the data as read correct?

IDC: They are.

TC: Prosecution has no evidence of previous convictions.

29 LO: Mr. Wilson, you are advised that you may now present evidence in extenuation or mitigation of the offenses of which you stand convicted. You may, if you wish, testify under oath as to such matters, or remain silent, in which case the court will not draw any inferences from your silence. In addition, you may, if you wish, make an unsworn statement in mitigation or extenuation of the offenses of which you stand convicted. This unsworn statement is not evidence and you cannot be cross-examined upon it, but the prosecution may offer evidence to rebut anything contained in the statement. The statement may be oral or in writing, or both. You may make it yourself or it may be made by your counsel, or both of you. Consult with your counsel now and advise the court as to your desire.

Accused: Sir, I wish to remain silent. My counsel will present the matter for me.

LO: All right.

IDC: With the permission of the court I would like to submit in evidence three documents which will be marked Defense Exhibits A, B, and C.

LO: Do you wish to introduce all of these at one time or one at a time?

IDC: Is there any objection if I read the last one first?

LO: One moment, please, Doctor. Will you please present them to the reporter and have her mark them and then pass them to me?

IDC: O.K. Fine. ° They are A, B, C.

LO: Will you mark this Defense Exhibit A for Identification?

The document referred to was marked Defense Exhibit A for Identification.

LO: And this one Defense Exhibit B for Identification?

The document referred to was marked Defense Exhibit B for Identification.

LO: And Defense Exhibit C for Identification.

The document referred to was marked Defense Exhibit C for Identification.

LO: Does the prosecution have any objection to these Exhibits?

TC: No objection.

30 LO: Defense Exhibits A, B, and C for Identification will be received in evidence as Defense Exhibit A, Defense Exhibit B, and Defense Exhibit C, respectively.

The documents marked Defense Exhibit A for Identification, Defense Exhibit B for Identification, and Defense Exhibit C for Identification, were admitted in evidence and marked Defense Exhibit A, Defense Exhibit B, and Defense Exhibit C, respectively.

LO: You may now read them.

Individual counsel read Defense Exhibits A, B, and C to the court.

IDC: Will the reporter mark these documents Defense Exhibits D and E for Identification?

The documents referred to were marked Defense Exhibit D for Identification and Defense Exhibit E for Identification.

IDC: Defense Exhibit D for Identification which is the stipulated testimony of Dr. Werner Jaffe, and Defense Exhibit E for Identification which is the stipulated testimony of Captain H. M. Bertram, are offered in evidence as Defense Exhibit D and Defense Exhibit E.

TC: No objection.

LO: Mr. Wilson, I have here two documents headed "Stipulation"; upon which there are the signatures of your counsel, the trial counsel, and one purporting to be your own. You don't have to consent to any stipulation and if you do not care to consent then we must bring in

proof of the things stipulated to. Knowing this, do you agree to these stipulations?

Accused: I have no objection to the stipulation, sir.

LO: Do you enter into the stipulations of your own free will?

Accused: Yes sir.

LO: Defense Exhibits D and E for Identification will be received in evidence as Defense Exhibits D and E.

The documents marked Defense Exhibit D for Identification and Defense Exhibit E for Identification were admitted in evidence and marked Defense Exhibit D and Defense Exhibit E, respectively.

DC: Have I permission to read them to the court, sir?

LO: You have.

Defense counsel read Defense Exhibit D and Defense Exhibit E to the court.

31 DC: Defense requests a five minute recess.

President: The court will recess for five minutes.

The court recessed at 1050 hours, 21 August 1956.

The court opened at 1055 hours, 21 August 1956.

President: The court will come to order.

TC: Let the record indicate that all parties to the proceedings who were present at the time the court recessed are again present in court.

LO: Proceed.

IDC: With the permission of the court I would like now, on behalf of the accused, to present to the court those factors which the defense considers important with regard to the problem of extenuating and mitigating circumstances. After the accused has pleaded guilty as specified it is now our duty to find which sentence he should have, how the punishment should be, and in fulfilling this duty we shall have to consider everything as far as this trial was able to disclose, those factors which are in his favor but naturally also those which are to his disadvantage.

The accused is a man of fifty-two years of age. No doubt he has been in the employment of the Army for many years. No doubt—I think I can say that here although the discussion of the problem of jurisdiction has taken place in a closed session but nevertheless I think I am allowed to say that the accused voluntarily has resigned his position with the Army effective yesterday. He did

so because he felt that in view of the very grave charges brought against him he does not want to be a burden to the Army any more, and he does not want, whatever the outcome of this trial, to be a disgrace to the Army. I need not discuss at this time the legal repercussions of such resignation but I might say that I consider this a good gesture on the part of my client. It shows that he has not lost his sense of responsibility and it shows also that he does want to do everything he can to bring this trial to an end whereby no unnecessary examinations will take place and whereby finally, according to the offenses and in consideration of the factors which are in his favor, the sentence will be meted out.

There are factors which, in my opinion, are strongly in favor of the accused. His background and his past work have been considered by his superiors as of excellent character. This is the first time that this man of fifty-two years of age has been charged in any court with any offense. Having been retained as a civilian counsel I felt from the beginning and more and more of my working for him as an attorney I could not help feeling a strong sense of sympathy. I realized soon that the kind of offenses he has been charged with were not caused by a criminal disposition, have not been caused by a lack of responsibility towards society, I realized too that here a man, for certain reasons which were beyond his control, had been committing certain acts in the sexual field which are no doubt forbidden under the law but, nevertheless, deserve some human understanding. He was not a man who has committed any act, even in his capacity as an employee of the Army, that could be considered a disgrace to the Army; there was no act of violence; there was nothing which so often and unfortunately we are facing in these days and which form the background of a trial, it was strictly in the field of abnormal sexual relations that these offenses should have been and under his plea of guilty had been committed by the accused. The penalties, the maximum penalties under the law are very harsh. I do not think personally, and I may be allowed to say this as a civilian attorney, I do not think that they actually are in conformity with the measure of criminality, with the criminal intent which is al-

ways inherent in these kinds of cases. I may be allowed to say that we know that actually these things take place much more often, much more frequently, than society may be apt to admit, and we must say in all honesty and frankly that if all the cases of homosexual behavior which are really taking place would be tried in court, I do not think that the time of the court will be sufficient to have all these cases tried and brought to them.

In this particular case the accused is being charged with some offenses with men and some with young men. He admits these charges. I would like to mention here that not one of the persons concerned has ever brought any charge against him; they would not have complained at all; it was just due to the fact that everything which has taken place in the apartment there of the accused was a matter of voluntary acting, never of force, never of using any bad means, but it was actually a matter of voluntarily subjecting to these kinds of offenses. I tried, doing my duty as defense counsel with the able cooperation of Captain Washburn, we tried to find out naturally how this all came about, and I can only say that here is a man standing before you who never had any love in life, who never experienced any warm affection as most of us do, he never was married, he never had actually a loving woman, and, finally, after certain experiences he found himself in the Maritime Service and as it so happens, being on the high seas for many, many months, he experienced a kind of a love with a man, an officer on his ship, and there it happened into the life of a man so far apparently normal brought suddenly in a new experience, a kind of a friendship of intimate character with another man. You see suddenly a man who not only entertained—had the thought but also homosexual inclinations—a fact which will explain and can only explain the present course his life has taken. As I said before this man unfortunately never had any real love and finally he turned to the only man who could, in a way, give him some kind or some substitute of love. It explains also his whole way, it explains his kind of affection. It is true what the psychiatrist said about him—it is absolutely true that this man when he talks of any kind of love in his life he only

woman was ever able to give him a kind of love and not even the men he had connections with were able to do so as we sometimes find in life. The dogs—two of them died recently and only one is left—meant everything to him and I was amazed at the affection this man suddenly was able to show when he talked about the animals but never when he talked about human beings of both sexes. I think instead of trying to analyze his life and to analyze the career which finally led to these offenses, instead of trying to do this I can simply mention the fact that both psychiatrists, Doctor Jaffe and Captain Bertram, concurred in the opinion that here is not only a man who is to be considered a psychotic character, a man of strong psychopathic traits, but definitely to be considered a psychopathic personality who is on the borderline of schizophrenia. Well now, Mr. President and members of the court, we are not psychiatrists, we can only take on the face of it what the psychiatrist tells us. The word "borderline" may cause the impression that here is a man who may be insane. The defense has definitely refrained from raising this issue; we are of the opinion that our client is sane in the legal sense which does not mean, however, that there are grave doubts about the strong degree of mental incapacity, as you have to call these borderline cases. We cannot exactly determine the degree in percentage but we have to assume that both psychiatrists having examined the accused for several times and having him subjected even to a so-called electroencephalogram test—to a real brain test, if they concur in the opinion that this man is to be considered on the borderline between mental incapacity and capacity we know something at least. Assuming that he is legally sane, which I do not doubt a moment, still the degree having brought him to the borderline of schizophrenia, the degree to which he is to be considered mentally inferioritated, mentally incapacitated, seems to me a very high one. I, therefore, consider the opinion of the psychiatrists as the most important one, and I ask you to kindly consider this opinion as an essential factor in determining to which extent he deserves extenuating and mitigating circumstances.

I wish to say finally that the kind of sentence which we

are going to fix today should, after all, consider his background; it should consider that the man for the first time in his life, due to certain surroundings, due perhaps to alcoholic influence, due most of all to his lack of inhibitions and his inferiority in a mental way being a borderline case of schizophrenia, that he does not deserve a harsh sentence. Let us not forget that our sentence should not eliminate this man from society, that the sentence should not destroy him for life, but should, if the sentence is just and fulfills the purpose it should serve, it should help that this man regain his place in society and serve again and perhaps in a better way his country.

Thank you.

DC: If I may—just a moment, please. If it please the court, I would like to say a few words about the mechanics of your sentence in this case. I would first, however,
34 like to point out something which Doctor Brandt, I believe, did not, and probably Doctor Jaffe through modesty would not. I don't know whether the court is familiar with this name "Jaffe" or not. Doctor Jaffe, however, is a world recognized authority in his field and, of course, there is no contest as to the psychiatric testimony here since both psychiatrists are in agreement.

My portion of this thing goes strictly to the mechanics of your sentence. You gentlemen, of course, have all had experience on courts martial and you are aware that a common feature of a sentence in a court-martial case is a forfeiture. Generally with an accused soldier who is sentenced to a discharge, a punitive discharge, the sentence includes total forfeitures although it does not necessarily include forfeitures, they are not mandatory. Now since I know Major Tobin is a competent and conscientious law officer I am sure he will instruct you on this subject. Mr. Wilson, being a civilian, is not subject to forfeitures; he is, however, subject to be sentenced to a fine and I am sure the law officer will distinguish between those for you. Primarily the distinction is that a forfeiture means that a man loses pay which would accrue to him in the future; you are all no doubt aware that you cannot forfeit any pay of a soldier which has already accrued to him. A fine, on the other hand, must be paid by an individual out of his own pocket without regard to past or future pay. Now,

as a practical matter, when you sentence a soldier to a forfeiture the forfeiture ordinarily becomes effective on the date the convening authority takes action on the case, and the practical effect of it is simply that while the man is in confinement, awaiting discharge, he doesn't get paid; that's what it amounts to. Mr. Wilson isn't going to get paid any way, his pay is effectively cut off; so, even though your sentence should not include a fine he will be in the same position that a soldier would under like circumstances; he will not be receiving any income. I simply wanted to point this out to the court so that we could arrive at complete justice in the case. I do not feel that Mr. Wilson should be more severely punished than a soldier would be under like circumstances.

TC: If the court please, a few of what I consider important points. First, the psychiatric test. Gentlemen, let's realize that a man doesn't do the things Mr. Wilson did if he is a completely normal person; a man doesn't commit these acts without personality quirks. Psychiatrists have a nice funny name, a long one, one I can't even pronounce, for personality quirks which causes this sort of thing. A normal human being doesn't do these things, normaley, of course, being a relative term, a question of degree; so all we have is the psychiatrist telling us in a very nice way that the man has a personality quirk.

This sentence, Gentlemen, the law requires to be legal, appropriate, and adequate. There are several things that should be considered: (a) The possible perversion of these children; (b) We must set an example for the Command, for the children, that such conduct is of such a dangerous nature that we can effectively preclude its recurrence. We

must impress these children and Mr. Wilson that 35. we detest and deplore such criminal conduct and that we punish it strongly and appropriately. This may or may not have lasting effect on these children; it will help in precluding its having such effect to show them how strongly we punish such conduct. If I may be so presumptuous as to suggest to the court a sentence between twelve and seventeen years; ordinarily on the surface this seems rather light for such an array of offenses; however, I will call the court's attention to the man's age, his previous good service, and his plea which precluded these

children having to come into this court to testify on the witness stand. More than seventeen years, I believe, would be inappropriate; less than twelve certainly inadequate.

THE COURT: May it please the court, I do not want to continue the trial too long—only a few words in replying to the argument of trial counsel. He attacked the opinion of the psychiatrists in the argument that practically speaking every man who commits acts of this kind in the homosexual field is definitely to be considered abnormal so the psychiatrists will go out and say: "Well, we have a kind of a split personality," which would mean in terms that no man who ever commits offenses of this kind could be considered fully normal and would be the kind of a case as the psychiatrists have testified here. I do not think this is correct. I think a psychiatrist knows well how to determine the degree of mental incapacity, and he knows, of course, where otherwise we wouldn't need ever a psychiatrist in a case of sexual offenses, how to determine that this man having committed abnormal acts is so to be considered, in the psychiatric way, an abnormal man or not. So, in other words, we shouldn't mix up at all the fact that a sexual offense is always a kind of abnormal act, which it is, and the fact that it depends, of course, entirely on the kind of personality and the degree of mental illness to which extent we may be able to say here is a normal-abnormal man—if I might use this expression—having just committed abnormal acts but he is completely normal, or, to which degree here is a man who does and commits abnormal acts but still, from a psychiatric point of view, deserves our leniency and mitigation in every way because his mental capacity, which has nothing to do with the kind of acts he committed, is inferior so much or that it is not of a degree as in a normal being. In other words, I cannot accept the thesis that anybody who commits homosexual acts should be considered abnormal and there would be no room for psychiatric examination. If this were the case I think we should dispose of any psychiatric examination in any court trial, which, as you all from your experience know, never has been done; on the contrary, the fact sometimes that this kind of homosexual relations are being committed, in certain cases they lead sometimes to the conclusion it is very good and proper in this case to have a

psychiatrist examine the man; but it is not absolutely sure that any act of this kind is to be considered an abnormal act, so we have to mete out a sentence and not bother about the degree of mental incapacity: I can only repeat in this particular case that, according to both psychiatrists, we have not only a small degree but we have such a high degree of mental incapacity that it may be even doubtful whether it is a few inches to the right or a few inches to the left of the borderline. The defense is of the opinion that it is a borderline case without legal insanity, which we maintain strongly, and we ask the court to kindly follow us in this respect and to follow the psychiatrists. We have a case here of a very strong degree of mental inferiority which has to be considered when you mete out the sentence.

In conclusion allow me, please, to say one word in regard to the objects of these offenses—the boys and the juveniles who have been concerned. I know it is our duty to protect the young kids and I know, too, that we should consider perhaps lasting effect on these children. I cannot at this time, for technical reasons, introduce any evidence or refer to anything in this matter because after all the defendant has pleaded guilty, and having been sentenced as guilty we can only talk now about the degree of his guilt and about the circumstances in his favor or in his disfavor; but, since the trial counsel has introduced a kind of a reflection on the record I might call the attention of the court to the fact that if you read these trial records you will find, as I found, that actually all the boys concerned in this matter have been knowing quite well. I was amazed, if I might say this in conclusion, at the enlightenment, at the knowledge which these boys had developed in this particular field. I must say that it was quite a new experience to me, after reading these records, and I am sure the court has done so, seeing how well these boys concerned have been familiar with facts of life and facts of homosexual life. I do not wish, of course, that there could be ever any lasting effect on these boys, and I wish to say that just this idea and this consideration was it which made the accused man plead guilty to all charges because we wanted purposely and intentionally to avoid any of the repercussions which may have been

derived from putting anybody of the witnesses on the stand and having him going through the memories again. Nevertheless, if we tried to exhaust the record, if we are trying to appreciate and trying to follow it in any way, then we should not deny the fact that actually there was a kind of life going on in the community of these boys which apparently proves and shows that they knew much more about these things and that they practiced much more about these things than we can usually assume. It shows you, Gentlemen, that whatever the Code will say, and whatever our judicial conscience will feel about it, life is sometimes a little bit different from the way this Code has been created at the time of legislation. Life shows that certain things are usual and they happen actually without our wanting it, just because young men are now apparently more experienced and do certain things which perhaps are just as punishable under the law as the offenses committed by the accused here. We should bear in mind, of course, that these things are common, are usual, and though with disapproving them we should not deny the important fact that they still do not consider any crime of any offense worthy of this harsh sentence which the trial counsel has proposed you may impose upon the accused.

Again I ask you to please exercise your right for leniency and do not close the door entirely for this man in life. Give him the opportunity of again proving that he can be and will be a valuable member of society and take his place in our daily life as before. Thank you.

37 LO: Has the prosecution anything further?

TC: No sir, it does not.

LO: Although the Manual provides that the limitations set out in the Table of Maximum Punishments in paragraph 127c of the Manual are not binding upon courts in sentencing civilians subject to military law, the Manual does provide that the Table of Maximum Punishments may be used as a guide in determining appropriate punishment for civilians subject to military law, and, any confinement at hard labor imposed by you should not exceed the maximum provided in the Table of Maximum Punishments.

There are other limitations as to what may be legally imposed in the form of a sentence in this case. A civilian

subject to military law cannot be reduced in rank or grade; likewise, a civilian subject to military law is not subject to any type of punitive discharge or separation from the service. A court-martial may not adjudge hard labor without confinement against a civilian and, ordinarily, a fine rather than a forfeiture is the proper monetary penalty to be adjudged against a civilian subject to military law. Thus, the court-martial here today is limited in determining punishment to these types of punishment:

First, deprivation of liberty by way of confinement at hard labor or restriction to limits;

Second, adjudgment making the civilian pecuniarily liable in general to the United States for an amount of money specified in the sentence; and

Third, reprimand or admonition.

The Table of Maximum Punishments provides a maximum of seven years confinement at hard labor for each separate offense of indecent act or liberty with a child under the age of sixteen years. This is the offense alleged in the Specifications of Charge I. The Table provides a maximum of five years confinement at hard labor for each separate offense of sodomy, the offense charged in the Specifications of Charge II. The Table provides for a maximum of four months confinement at hard labor for each of the offenses charged in the Specifications of the Additional Charge. Thus, the cumulative maximum total in terms of confinement at hard labor which may be imposed here for the offenses charged is twenty-nine years and eight months.

If, in your deliberations, you should determine that a monetary penalty is appropriate you will find no guide in the Manual for measuring appropriate quantity. The Manual does, however, point out that the court should consider ability to pay, and provides further that in order to enforce collection a fine is usually accompanied by a provision in the sentence that, in the event the fine is not paid the person shall, in addition to any period of confinement adjudged, be farther confined until a fixed period considered equivalent to the fine has expired.

38 Do you have any questions on what I have said so far or are there any questions that remain unanswered?

President: There appear to be none.

LO: I hand you now a sentence work sheet which may aid in properly reducing your sentence to writing. I hand the defense a copy of it for their inspection. You should, after finally determining your sentence, strike from the sentence work sheet the portions that are inapplicable and fill in the blanks as appropriate. You will see that there is a space on there for punishments which I have mentioned previously but which are not included in the work sheet.

Any questions now?

President: No.

TC: Do you have any objections to the work sheet?

DC: No actual objections. I would like to point out that the way in which the brackets are arranged here could possibly lead to the conclusion that a fine is mandatory. In other words, the portion on fine is not included in brackets. I would like the court to be advised on that.

President: I think we understand that.

LO: My instruction, I think, has made that patently clear. In addition, I would refer defense counsel to the Manual for Courts-Martial to the model sentences; this is taken directly from the Manual.

President: The court will be closed.

The court closed at 1135 hours, 21 August 1956.

The court opened at 1210 hours, 21 August 1956.

President: The court will come to order.

TC: Let the record indicate that all parties to the proceedings who were present when the court closed are again present in court.

President: Bruce Wilson, it is my duty as president of this court to inform you that the court in closed session and upon secret written ballot, two-thirds of the members present at the time the vote was taken concurring, sentences you:

To be confined at hard labor for ten years.

39 LO: Has the prosecution any further cases to try at this time?

TC: It does not, sir.

President: The court will adjourn to meet at my call.

The court adjourned at 1211 hours, 21 August 1956.

40 AUTHENTICATION OF RECORD OF TRIAL
in the case of

BRUCE WILSON, AGO A-407 943, GS-11, Department of
the Army Civilian Comptroller Division, Berlin Command
(7781), Department of the Army, Berlin, Germany

FRANCIS X. BRADLEY

Francis X. Bradley

Lt. Col., Inf., President

HORACE L. JENNERSON

Horace L. Jennerson, Lt Col, SigC,

a member in lieu of the law officer

because of his absence.

I have examined the record of trial in the foregoing case.

MELBURN N. WASHBURN

Captain, JAGC, Defense Counsel

41 **Defense Exhibit "A"**

Form approved.

Budget Bureau No. 50-R0123.

Standard Form No. 51

August 1946

U. S. Civil Service Commission

Administrative-Unofficial ()

Official:

Regular () Special ()

Probational (x)

REPORT OF EFFICIENCY RATING

As of 22 August 1947 based on performance during
period from 22 Oct 1946 to 22 Aug 1947, Bruce Wilson,
Auditor, CAF-930-9, Fiscal Section, PHILRYCOM, APO

707

42

3 September 1947

Your efficiency rating from 22 Oct 46 to 22 Aug 47 is
Excellent.

DONALD O. THURNAU

Donald O. Thurnau

Chief, Adm Dir, CPS

43

Defense Exhibit "B"

HEADQUARTERS
USAREUR AUDIT AGENCY, 7756TH AG
APO 757 U.S. ARMY

25 January 1955

Dear Mr. Wilson:

I am happy to forward Standard Form 50, dated 20 January 1955, which discloses your promotion from GS-10 to GS-11.

This promotion is made possible through a reclassification of your position and a related determination that your experience and/or educational qualifications meet Civil Service requirements, together with my belief that your performance with this Agency has been of such quality as to warrant placing you in a position of higher trust and responsibility.

Please accept my heartiest congratulations on this achievement.

Sincerely yours,

/s/ J. A. MARTIN
J. A. Martin
Colonel FC
Chief

Mr. Bruce Wilson
Resident Auditor
Berlin Audit Residency
USAREUR Audit Agency

A Certified True Copy

ZANE E. FINKELSTEIN
Zane E. Finkelstein, 1st Lt. JAGC
Trial Counsel

Defense Exhibit "C"

HEADQUARTERS
 USAREUR AUDIT AGENCY, 7756th AF
 APO 742 US ARMY

AA C 201 Wilson, Bruce (Civ)

24 August 1955

SUBJECT: Letter of Appreciation

To: Mr. Bruce Wilson
 Resident Auditor
 Berlin Audit Residency
 USAREUR Audit Agency, 7756th AF
 APO 742, US Army

1. With the imminency of your departure from this organization, I wish to take this opportunity to extend my sincere thanks and appreciation to you for a splendid performance of your assigned duties.

2. Although I have have not had the opportunity to observe your work for a prolonged period, the high praise which I heard showered upon you during my recent trip to the Berlin Command left no doubt in my mind of the high calibre of performance you have rendered. All elements of the Berlin Command had infinite regard for your abilities, were appreciative of your sound advice and counsel, and enjoyed your friendly cooperation. Your actions and performance have done much to enhance the reputation and prestige of this agency throughout the Command.

3. This agency will miss your help but we are glad that you have found the opportunity for employment more in accordance with your desires. The best wishes of myself and staff accompany you to your new assignment.

4. A copy of this correspondence has been made a part of your official 201 file.

J. G. BLACK
 J. G. Black
 Colonel FC
 Commanding

A Certified True Copy

ZANE E. FINKELSTEIN

Zane E. Finkelstein, 1st Lt. JAGC

Trial Counsel

45

Defense Exhibit "D"

UNITED STATES

VS.

BRUCE WILSON, CIV.

STIPULATION

It is hereby stipulated by and between the prosecution and the defense, with the express consent of the accused, that if Dr. Werner Jaffe, 8 Paulsborner Strasse, Berlin, Germany, were present in court and duly sworn, he would qualify as an expert witness in psychiatry and would testify substantially as follows:

I am presently engaged in the practice of medicine, specializing in psychiatry and neurology in Berlin, Germany. I have studied both in Germany and the United States, have been a resident psychiatrist in an American hospital, and have practised psychiatry in New York City.

Mr. Bruce Wilson was seen by me about five times during the month of July and August 1956 at the 279th Station Hospital in Berlin, Germany, for psychiatric interview. According to his physical constitution, personal development and status, he can be classified as a typical schizoid personality, not to be confused with a schizophrenic. He gives a history of having descended of a family where strictness seemed to be more important than warmth or affection, and he apparently had and has no contact with his family and no real attachment of parent and sibling.

His life appears to have been an unsteady one concerning both his professional and his interpersonal relations. His history indicates that he never had any true and warm attachments for any person or object. I had the impression that the only time he seemed to show some kind of emotion was when he talked of his three dogs, two of which had to be killed during his absence. He is a person without any

deep-seated and lasting interpersonal or social relations at all.

He has had hetero- and homosexual relations, as well. He never experienced any kind of real love in the broader sense and on a mature level. He never experienced a lasting friendship and does not feel that he belongs to anybody, society, or religion besides himself. His history indicates that all interpersonal, social, or professional experiences or attachments were of short duration and quite superficial. The early development, socialization, sexual attitude, social adjustment, and occupational history are quite significant for a schizoid, self-centered personality. In the field of general behavior, sensorium, and intellectual capacities, Mr. Wilson does not show any abnormal

46 signs. It is my opinion that, at the time of the offenses with which he is charged, he was capable of distinguishing right from wrong and of adhering to the right, and that at the present time he is capable of understanding the nature of the proceedings against him and cooperating in his own defense.

The emotional picture is superficially one of indifference and euphoria. There are, however, underlying anxieties, tensions, and much hostility against the world and society in which the patient feels misunderstood.

Thought contents and thought mechanism are not psychotic. There is no insight that the trouble the patient is in at the moment arose from his abnormal personal troubles and are not caused by a "backward" society.

Besides the abnormalities mentioned, there are definite psychopathic personality traits. Before and during the interview, the patient mentioned quite often the fact that the room may be wired, that the guard may be listening to the interview, that in the room next to the one we were in a recording machine may be installed, and so forth. Consequently the patient crawled quite frequently about the floor all over the room looking under tables, watching the central heating system, window vents, and so forth.

The patient admits having drunk much alcoholic beverages because of living under nervous strain from overwork in his office. He thinks that the influence of overwork, nervous strain, and drinking habits were responsible for the sexual aberrations which occurred in his home and which finally gave rise to his present difficulties.

Summarizing all the facts known about the early development of Mr. Wilson, of his position in society, his professional ways, his sexual habits, and his kind of thinking, one may call Mr. Wilson a rationalizing, self-centered, schizoid personality, as distinguished from any mental aberration, who, while legally sane, never had and never will have any real deep-seated or true emotionally underlined contact with anything or anybody besides himself.

His incapability of adjusting to any kind of sexuality of a lasting hetero- or even homosexual kind should be judged only as a part of a general, almost psychotic disturbance of his personality and the impossibility of any kind of adjustment and normal interpersonal contact. Mr. Wilson should therefore be considered a psychopathic personality on the borderline of schizophrenia.

MELBURN N WASHBURN

Melburn N Washburn

Capt, JAGC

Defense Counsel

BRUCE WILSON

Bruce Wilson

DA Civilian

Accused

ZANE E FINKELSTEIN

Zane E Finkelstein

1st Lt, JAGC

Trial Counsel

DR. ARTHUR BRANDT

Individual Defense Counsel

47

Defense Exhibit "E"

UNITED STATES

VS.

BRUCE WILSON, CIV.

STIPULATION

It is hereby stipulated by and between the prosecution and the defense, with the express consent of the accused,

that if Captain H. M. Be tram, Medical Corps, 279th Station Hospital, Berlin, Germany, were present in court and duly sworn, he would qualify as an expert in psychiatry and would testify substantially as follows:

I have conducted psychiatric examination and evaluation of Mr. Bruce Wilson. As a result of my examination, I conclude that at the time of the offenses with which he is now charged, he was mentally capable of distinguishing right from wrong and of adhering to the right, and that at the present time he is capable of understanding the nature of the proceedings against him and of cooperating in his own defense.

I have further concluded that, although Mr. Wilson is not psychotic, he is a psychopathic personality tending toward and on the borderline of schizophrenia.

ZANE E FINKELSTEIN

Zane E Finkelstein

1st Lt. JAGC

Trial Counsel

MELBURN N WASHBURN

Melburn N Washburn

Capt. JAGC

Defense Counsel

DR. ARTHUR BRANDT

Individual Defense Counsel

BRUCE WILSON

Bruce Wilson

DA Civilian

Accused

OUT-OF-COURT-HEARING

LO: What is the nature of your argument?

IDC: I, on behalf of the accused, move for the dismissal of the charges for reasons of lack of jurisdiction. This is the first case, to my knowledge, where any civilian employee of the Army was subject to court-martial. The general rule of this kind recognizes that the military jurisdiction is exercised also in regard to civilian employees yet no case of this kind, to my knowledge, has ever been decided upon by the Supreme Court so, of course, I have to leave this question as it stands and leave it perhaps to future review by civil courts or by the board of review whether really, as generally assumed, there is jurisdiction over civilian employees. In this particular case I would like to emphasize, however, that the accused was formerly under contract with the Army as a civilian employee but which contract had expired years ago and from there on has been silently continued on a verbal basis. This contract has been finally terminated by the voluntary resignation tendered by the accused effective yesterday. I think it can be assumed or, if necessary, we may submit evidence that it is a fact that the accused has tendered his resignation to the Civil Personnel Officer effective August 20, at 1700 hours. According to the opinion held by the defense, the termination of the employment also makes cease the jurisdiction of the military court with certain exceptions and I must add here, and I can now refer to the Manual on page 14, that none of these exceptions, in my opinion, fall under the category we have to decide here. Exception number one reads that to the general rule of ceasing jurisdiction some exceptions are recognized which include the following: "Jurisdiction as to an offense against the code for which a court-martial may adjudge confinement for five years or more committed by a person while in the status in which he was subject to the code"—no doubt this is the case but in this case also it is said: "and for which he cannot be tried in the courts of the United States or any State or Territory thereof" and so on. Number three: "Jurisdiction under Article 3a should not be exercised without the consent of the Secretary of the Department concerned."

Now three factors have been combined to make jurisdiction possible. Number one is given; number two, in my opinion is not given for the simple reason that the accused, being a civilian, even if he is outside the territory of the United States he can always be tried by a civil court within the territory of the United States even if the offense he is being charged with has been committed outside the territory. We have these cases in many instances. I remind you perhaps of the quite famous case of the Major—I don't want to call his name—who committed, while in the Army, a murder on the Beach of Cassino in Italy, and he was charged with having killed his superior officer and finally after being discharged was brought to justice before the Federal Civilian Court in the United States. So having jurisdiction over a civilian who is now, at the time we start proceedings here, an employee of the United States Army, in my opinion the jurisdiction has ceased definitely from the moment on where he terminated his employment with the Army. Whereas it may not be decided upon right now I raise the objection for the record; also it is very doubtful, in my opinion, that at the time he committed the offenses even if at this time he was an employee of the Army he would be subject to military procedure and to court-martial.

I know that there will be an objection raised by the trial counsel. I know it is generally assumed, although no foundation for this assumption has ever been given, that when a trial has started whereby the definition of the trial is apparently used in a wider and broader sense, in other words if military procedure has opened and at this time the accused was subject to military procedure, then if this has been done with a view to trial it will continue. I do not see any foundation in this assumption, there is no proof for it, it is just a general idea, but on the other hand I feel it is my duty to bring this to the knowledge of the law officer and have it put into the record. I do not see any foundation for the generally assumed fact that just the opening of a proceeding or the opening of an investigation, which is always the case, with a view to later trial will practically establish court-martial jurisdiction—military jurisdiction—once and for all. In my

opinion the termination of the employment by the accused makes him not longer liable and subject to military procedure and for this reason I move to dismiss the charges for lack of jurisdiction.

DC: If I may I would like to add just one thing. If the law officer requires if defense is prepared to prove that Mr. Wilson's resignation, effective yesterday, was received yesterday by the Civilian Personnel Officer in this Headquarters.

TC: Prosecution is willing to stipulate that a piece of paper purportedly signed by Mr. Wilson and purportedly containing his resignation was received by the Civilian Personnel Officer in this Command yesterday.

The court's attention is respectfully directed to the provisions of paragraph (11), Article 2 of the Uniform Code of Military Justice, which provides that: "Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States and without the following * * * " non-applicable territorial limitations, are subject to the code.

50 Prosecution is prepared to prove that the accused has been employed by the United States Army for the last nine years and five months and at the time of the offenses, his apprehension, the reference for trial, and the service of charges, he was employed by the Comptroller Section of Berlin Command, he was entitled to MPC's and was so paid, that he carried an AGO Card and a Passport indicating that he was accredited to the U. S. Commander of Berlin; that the accused occupies an apartment built under the supervision of the Berlin Command Engineer upon property requisitioned by the United States Army and with funds provided for the cost of occupying Berlin; that the accused had previously entered and departed Berlin pursuant to orders issued by order of the Commanding General of Berlin Command; that the accused regularly purchased goods and services from the European Exchange System operated by the United States Army, the Quartermaster Commissary Store, and the U. S. Army Post Office; that his dogs and telephone were and

are listed in separate registers and directories maintained by the United States Army; that, in short, the accused at the time of the offenses was and is now a member of the military community of Berlin as distinguished from the indigenous population. The prosecution can further show that the accused by being so employed and by so accompanying the U. S. Army in Berlin is not subject to the civil or criminal jurisdiction of the Berlin Courts pursuant to Allied Kommandatura Law 7.

The power of Congress to make amenable to military jurisdiction the classes of civilian personnel mentioned in the cited reference to the Uniform Code of Military Justice, including the accused, is so well settled as to be really beyond dispute. The attention of the court is respectfully drawn to Aycock and Wurfel "Military Law Under the Uniform Code of Military Justice", on page 53 et seq., where a complete digest of all the cases, including United States Supreme Court cases, can be found, and to the recent United States Supreme Court cases of *Kinsella v. Krueger*, 713, and *Reid v. Covert*, 701, decided on 11 June 1956, wherein congressional power to make such persons subject to military law is given renewed sanction.

With regard to the accused's resignation, it is well settled that jurisdiction once attached continues for all purposes. The Executive Order provision for this can be found in paragraph 11d, Manual for Courts-Martial, 1951, that the accused cannot terminate it by his own voluntary act. I respectfully call the court's attention to *Perlstein v. United States*, 151 Federal 2d, on page 167, where a certiorari was dismissed by the United States Supreme Court at 328 U.S. 822, and the recent case of the *United States v. Rubenstein* recently decided by the U. S. Court of Military Appeals. In the latter case the accused, prior to apprehension, prior to service of charges, quit his job and removed himself to the Republic of Korea; the court therein held that he was still amenable to the Uniform Code of Military Justice. The Covert case is interesting in this particular since a rehearing was ordered by the Court of Military Appeals and the rehearing was held in the
 51 United States, and again the court, with the United States Supreme Court sanction, stated that jurisdiction once attached continues for all purposes.

IDC: The defense does not deny that at the time of the charged offenses the accused was employed; only the defense maintains that at the time of the trial, as of today, the employment has terminated which, of course, the trial counsel does not object to either. Now, of course, as to the legal aspects of this case I should like to refer to the section of Article 3 (a) of the Code which seems to me the essential one.

Article 3 (a) again absolutely makes it essential that as a requirement for military jurisdiction you must establish the fact that the person cannot be tried in the courts of the United States or any territories thereof. This is not the case in our case. We have a situation here where a man having terminated his employment with the United States Army can always be tried in the Federal Court of the United States in spite of the fact that the offenses charged have been committed outside of the United States, and this factor missing I do not see any chance how military procedure can continue—we have to turn him over to the civilian authorities and courts. The trial counsel refers, in this respect, to the so-called effect of termination of term of service which is reprinted in the Manual on page 16. May I respectfully call the attention of the law officer to the fact that this apparently does not concern our case. We have there a case that if action is initiated with view to trial because of an offense committed by an individual prior to his official discharge, he may be retained in the service for trial to be held after his period of service which otherwise had expired. We have here, first of all, nothing but the Command; we have nothing which can be considered the real opinion of the higher court; and secondly, it does not affect our case because apparently this is a case where someone can be retained in the service so it must be a person really being enlisted or otherwise belonging to the armed forces which can then be retained in the service and this, you will agree with me, cannot be done in the case of Mr. Wilson. He is a civilian employee and he is always in the position and able and capable of terminating the employment, and the case apparently meant there has not definitely been decided; the opinion of the Manual has never been decided, to my knowledge, and this case does not absolutely affect the

decision we have to make here. So, not only for the record but also for the actual dismissal of the charges, I move that here is no jurisdiction and for lack of jurisdiction my motion goes for dismissal of the charges.

TC: If the law officer please, one further factor for the record. I think the court is capable of judicially noting—and the law officer also—that Berlin, Germany, is outside the territorial and maritime jurisdiction of the United States and outside the applicable provisions of Title 18 of the United States Code. The recent case of *Toth v. Talbott* casts sincere doubt upon the applicability of Article 3 (a) of the Uniform Code of Military Justice and the trial counsel is not relying solely thereupon.

52 The trial counsel is relying on Article 2 (11) of the Uniform Code of Military Justice, primarily on the assertion that the jurisdiction exists.

LO: What is the citation—I believe you said Perlstein—

TC: Yes sir. *Perlstein v. United States*, 151 Federal 2d, 167; certiorari dismissed at 328 U.S. 822.

IDC: May I, with your permission, raise one last point? It had better be raised in a question. Under Article 3 (a) has the necessary consent been obtained of the Secretary of the Department concerned?

TC: Prosecution is most willing to stipulate that there is no express permission from the Secretary of the Army to try this particular case.

IDC: You mean to say that it is necessary but the answer would be that it hasn't been obtained?

TC: I am not willing to concede that it is necessary; I am willing to concede that it has not been acquired.

IDC: Thank you.

LO: The motion for dismissal on the ground of lack of jurisdiction is denied.

The court will be recalled.

Let the record reflect that present at this out-of-court hearing was the law officer, the accused, counsel for both sides, and the reporter, and that a verbatim transcript of the proceedings will accompany the record as Appellate Exhibit 1.

The out-of-court hearing was terminated at 1019 hours, 21 August 1956.

COURT OF MILITARY APPEALS
UNITED STATES, Appellee

v

BRUCE WILSON, GS-11, Department of the
Army, Civilian, Appellant

9 USCMA 60, 25 CMR 322

Courts-martial § 47—constitutionality of jurisdiction over
civilian employees overseas.

1. The provisions of UCMJ, Art 2(11) extending court-martial jurisdiction to persons employed by the armed forces without the continental limits of the United States and certain territories thereof, are constitutional insofar as applied to a civilian employee of the Army who was in Germany pursuant to his employment, who used military housing and exchange facilities in connection with his employment and residence in Germany and who was not subject to the civil or criminal jurisdiction of the German courts. (Citing U. S. v Burney, 6 USCMA 776, 21 CMR 98; U. S. v Rubenstein, 7 USCMA 523, 22 CMR 313; U. S. v Marker, 1 USCMA 393, 3 CMR 127 and other cases. Distinguishing Reid v Covert, 354 US 1, 1 L ed 2d 1148, 77 S Ct 122.)

Courts-martial § 47—jurisdiction of civilian employees
overseas—effect of resignation.

2. The accused's amenability to trial by court-martial was not terminated by his submission of his resignation from his job the day before trial where charges had been served and the Art 32 investigation had been conducted almost two months earlier. Under these circumstances, jurisdiction had attached before tender of the resignation and the proceedings could, therefore, continue to completion. (Citing U. S. v Robertson, 8 USCMA 421, 24 CMR 231; U. S. v Rubenstein, 7 USCMA 523, 22 CMR 313.)

Defenses § 35; Pleas § 9—evidence of mental condition insufficient to render guilty plea improvident.

3. The evidence of the accused's mental condition, presented during the sentence proceedings, was not incon-

sistent with his pleas of guilty where, although indicating the accused was suffering from a disorder described as a schizoid personality, the psychiatric testimony also indicated the accused was capable of distinguishing right from wrong and of adhering to the right and was able to understand the proceedings against him and to cooperate in his defense. Furthermore, the defense counsel specifically stated he was not contending the accused was insane and only wanted the accused's mental condition considered as a matter of extenuation and mitigation. (Citing U. S. v. Hinton, 8 USCMA 39, 23 CMR 263.)

No. 9638

Decided March 28, 1958

On petition of the accused below. CM 392423, not reported below. Affirmed.

First Lieutenant Jerome H. Gerber argued the cause for Appellant, Accused. With him on the brief were *Colonel James M. Scott, Captain Arnold I. Melnick, and First Lieutenant Bert M. Gross.*

54. *First Lieutenant Richard W. Young* argued the cause for Appellee, United States. With him on the brief were *Lieutenant Colonel John G. Lee, Lieutenant Colonel Thomas J. Newton, and First Lieutenant Arnold I. Burns.*

Joseph M. Snee, S.J., on amicus curiae brief.

Arthur John Keffe, Esquire, on amicus curiae brief.

Rear Admiral Chester Ward, USN, and Commander Carl B. Klein, USNR, on amicus curiae brief.

Lieutenant Colonel Robert W. Michels, USAF, and Major Fred C. Vowell, USAF, on amicus curiae brief.

Opinion of the Court

ROBERT E. QUINN, Chief Judge:

The accused is a civilian. He was employed by the Department of the Army in the Comptroller Division, Berlin Command. He went to Berlin on a passport accrediting him to the U. S. Commander of Berlin, and he entered and departed from Berlin at various intervals during his employment pursuant to orders issued by the military.

Military housing and exchange facilities were used by him in connection with his employment and residence in Berlin. It also appears that he was not subject to the civil or criminal jurisdiction of the Berlin courts by virtue of the provisions of Allied Kommandatura Law No. 7.

On his plea of guilty, a general court-martial convicted the accused of three acts of sodomy, in violation of Article 125, Uniform Code of Military Justice, 10 USC § 925, two charges of lewd and lascivious acts with persons under the age of sixteen, and two specifications alleging the display of lewd and filthy pictures to minors, with the intent to arouse their sexual desires. It is con-

Headnote 1 tended that because the accused is a civilian he is not constitutionally subject to trial by court-martial. We rejected like arguments in a number of previous cases and sustained the constitutionality of Article 2(11) of the Uniform Code which subjects to trial by court-martial "persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States" and without certain other territories of the United States. *United States v Burney*, 6 USCMA 776, 21 CMR 98; *United States v Rubenstein*, 7 USCMA 523, 22 CMR 313; *United States v Marker*, 1 USCMA 393, 3 CMR 127.¹ The question is raised anew, however, by the decision of the United States Supreme Court in *Reid v Covert*, 354 US 1, 1 L ed 2d 1148, 77 S Ct 1222 (1957). In that case the Supreme Court held Article 2(11) to be unconstitutional as applied in a capital case to a civilian dependent of a serviceman who accompanies such serviceman outside the United States and the specified territories.

Writing the majority opinion for the court, Mr. Justice Black noted that the wives, children, and other dependents of servicemen could not be regarded as members of the land and naval forces, though accompanying servicemen abroad at Government expense and receiving benefits from the Government such as quarters, medical care and ex-

¹ We prefer to reach the question of jurisdiction in this case under the provisions of subdivision 11 of Article 2 rather than consider whether the circumstances obtaining in Berlin constitute that area occupied territory, as contended by Army Government counsel. See TIAS 3425, 3427; also *Reid v. Covert*, 354 US 1, 1 L ed 2d 1148, 77 S Ct 1222, footnote 61.

change privileges, any more than if they were "living on a military post in this country." As citizens of the United States they were entitled, in a capital case, to indictment by a grand jury and to trial by a jury in a court of law, as required in the Fifth and Sixth Amendments to the United States Constitution. In the course of his opinion,

Justice Black referred with approval to Colonel Winthrop's statement that no statute can be framed

55 *"by which a civilian can lawfully be made amenable to the military jurisdiction in time of peace."* Significantly, however, the Justice specifically observed that "there might be circumstances where a person could be in the armed services for purposes of clause 14 [of Article I, section 8 of the United States Constitution] even though he had not formally been inducted into the military or did not wear a uniform." *Id.* at page 23. From the latter standpoint the critical inquiry is the nature of the civilian's "contact or relationship with the armed forces." *Id.* at page 30.

Under clause 14 of Article I, section 8, Congress is granted the power "to make Rules for the Government and Regulation of the land and naval Forces." In exercising its power Congress does not act as an automaton. Rather, it possesses wide discretion to determine the measures and means necessary for complete and effective use of its power. Contemporaneously with the adoption of the Constitution, Congress subjected to military law "retainers to the camp" because they were closely connected with the proper functioning of the uniformed forces in the field. Under the Uniform Code, the designation has been changed by Congress to include persons "employed" by the armed forces in foreign lands. Cogent reasons exist for the identification of such persons with uniformed personnel for the purpose of the regulation of their conduct. We discussed many of these reasons in the *Burney* case, and we need not reiterate them here. See also *United States v. McElroy*, 158 F. Supp. 171 (D. DC) (1958), in which Judge Holtzoff denied a petition for habeas corpus for a civilian employee convicted by an Air Force court-martial at the Nonasseur Depot, Morocco. Suffice it to say that employees of the armed forces abroad are not present with the military merely for morale or convenience. They both

live and work in the military community. They are required for, and are depended upon to carry out, the assigned missions of the military forces overseas. Functionally, as well as practically, they are either "part of the armed forces" or "so directly connected with such forces" as to be inseparable from them for the purpose of observing the standards of conduct prescribed by Congress for the government of the military.

In recognizing the essential oneness of service and community life between those in uniform and those out of uniform, Congress did not expand military jurisdiction "at the expense of the normal and constitutionally preferred system of trial by jury." *Toth v Quarles*, supra, pages 22-23. It was simply exercising its constitutional power to make rules for the government of the armed forces. We hold, therefore, that as applied to employees of the armed forces under the circumstances of this case, Article 2(11) of the Uniform Code is constitutional.

The accused also attacks the right of the military to try him on the ground that he terminated his Headnote 2 amenability under Article 2(11) by submitting a resignation from his job. The resignation was tendered the day before trial. Charges had been served and the Article 32 pretrial investigation had been conducted almost two months earlier. Manifestly, jurisdiction over him had attached long before the tender, and the proceedings could, therefore, continue to completion. *United States v Robertson*, 8 USCMA 421, 24 CMR 231; *United States v Rubenstein*, 7 USCMA 522, 22 CMR 313.

Turning to the merits of the case, the accused contends that he was prejudiced by the law officer's Headnote 3 failure to withdraw his plea of guilty and direct that he be tried as though he had entered a plea of not guilty. He maintains that evidence of his mental condition, which was presented during the sentence procedure, is inconsistent with his plea of guilty on four of the charges. See Article 45(a), Uniform Code of

² *Toth v Quarles*, 350 US 11, 15, 100 L ed 8, 76 S Ct 1 (1955).

³ *Duncan v Kahanamoku*, 327 US 304, 313, 66 S Ct 606, 90 L ed 688 (1946).

58
Military Justice, 10 USC § 845; United States v Tréde, 2
USCMA 581, 10 CMR 79.

56 The evidence relied upon by the accused is in the form of a stipulation of testimony by two psychiatrists. "One doctor described the accused as a "typical schizoid personality, not to be confused with schizophrenia." The witness went on to say that in "the field of general behavior, sensorium, and intellectual capacities," the accused does not show "any abnormal signs." The doctor also observed that the accused's thought content and thought mechanisms were not psychotic and he found "no insight that the trouble the patient is in . . . arose from his abnormal personal troubles." Finally, the doctor said that in his opinion the accused was capable of distinguishing right from wrong and of adhering to the right at the time of the commission of the offenses and that he was able to understand the proceedings against him and to cooperate in his defense. The stipulated testimony of the second doctor is substantially to the same effect. In part, he said that the accused tended "toward and on the borderline of schizophrenia."

At the trial the accused was represented by individual civilian counsel and appointed defense counsel. In evaluating the psychiatric evidence the accused's counsel conceded that it raised no issue regarding the accused's legal responsibility for the offenses to which he pleaded guilty. Individual counsel in part said:

" . . . The word 'borderline' may cause the impression that here is a man who may be insane. *The defense had definitely refrained from raising this issue; we are of the opinion that our client is sane in the legal sense* which does not mean, however, that there are grave doubts about the strong degree of mental incapacity, as you have to call these borderline cases. We cannot exactly determine the degree in percentage but we have to assume that both psychiatrists having examined the accused for several times and having him subjected even to a so-called electro-encephalogram test—to a real brain test, if they concur in the

¹ In the lexicon of psychiatry the described condition falls into the category of behavior disorders. SR 40-1025-2, June 1949.

opinion that this man is to be considered on the borderline between mental incapacity and capacity we know something at least. *Assuming that he is legally sane, which I do not doubt a moment*, still the degree having brought him to the borderline of schizophrenia, the degree to which he is to be considered mentally inferioritated, mentally incapacitated, seems to me a very high one. *I, therefore consider the opinion of the psychiatrists as a most important one, and I ask you to kindly consider this opinion as an essential factor in determining to which extent he deserves extenuating and mitigating circumstances.*" (Emphasis supplied.)

A similar situation was presented to us in *United States v. Hinton*, 8 USCMA 39, 23 CMR 263. What we said there applies equally to this case and provides a complete answer to the accused's claim of error.

Incidental evidence of a mental condition is not proof of the existence of the condition to that degree which the law requires before it will hold harmless a person who commits an act which, but for the condition, would be criminal. . . . In a guilty plea case we cannot disregard the probability that the accused and his counsel weighed the evidence and determined that it was inadequate for an effective legal defense or to negate the existence of a specific intent. As a result, they could well have decided to disregard the evidence in favor of the possible advantage of a guilty plea. . . . The critical question, therefore, is whether the accused and his counsel were aware of the legal effect of the evidence claimed to be inconsistent with the plea of guilty.

* * * * *

Moreover, it is not contended on this appeal that the accused is anything but legally sane and fully responsible for the offenses for which he was convicted or even that he has any other meritorious defense.

57 Under the circumstances, we must conclude that the plea of guilty was not improvidently entered. Indeed, on this record it would be a 'hollow gesture' if

we were to set aside the plea of guilty and order a rehearing. United States v Wright, supra, page 189.

The decision of the board of review is affirmed.
Judges LATIMER and FERGUSON concur.

58

6161

(File Endorsement Omitted)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil No. 6161

THE UNITED STATES OF AMERICA
ex rel. BRUCE WILSON, *Petitioner*.

v.

MAJOR GENERAL JOHN F. BOHLANDER, Commander,
Fitzsimons Army Hospital, Denver, Colorado,
Respondent.

Messrs. Arthur John Keefe, Esq., George J. Nounair, Esq., Washington, D. C., and William C. McClearn, Esq., Denver, Colorado, for Petitioner; Donald E. Kelley, Esq., United States Attorney, and John S. Pfeiffer, Esq., Assistant United States Attorney, Denver, Colorado; and F. M. Sasse, Colonel, JAGC, Fitzsimons Army Hospital, Denver, Colorado; and Lt. Col. Peter S. Wondolowski, JAGC, U.S. Army, Washington, D. C., for Respondent.

Memorandum Opinion and Order—Nov. 10, 1958

ARRAJ, District Judge.

This matter is before the Court on a petition for a Writ of Habeas Corpus. The petitioner is and at all times pertinent hereto was a citizen of the United States employed as a civilian auditor by the Department of the Army in the Comptroller's Division in Berlin, Germany. During the time he was so employed, petitioner was charged with certain offenses in violation of Articles 125 and 134 of the Uniform Code of Military Justice. On his plea
59 of guilty a General Court Martial convicted him of

various violations of the said Articles and sentenced him to 10 years at hard labor; the Commanding General approved the conviction and reduced the sentence to 5 years. The Board of Review affirmed the conviction and the Court of Military Appeals affirmed the Board's action. *United States v. Bruce Wilson*, 9 USCMA 60, 25 CMR 322 (1958).

Petitioner has been detained and confined under the jurisdiction of the United States Army, under said sentence, since August 21, 1956, and is presently confined in this district at Fitzsimon's Army Hospital, Denver, Colorado.

Petitioner has filed his Petition for a Writ of Habeas Corpus in this Court contending that his arrest, detention and confinement by the military authorities has been and is unlawful and in violation of the Constitution of the United States; he further contends that as an American citizen and civilian he could not be tried by court martial, and that only a Court constituted under Article III of the Constitution has jurisdiction to try him.

Respondent defends on the ground that jurisdiction was proper under Article 2(11) of the Uniform Code of Military Justice. Thus, the sole question to be determined by this Court is whether Article 2(11) of the Uniform Code of Military Justice can be constitutionally applied to an American citizen employed by the Department of the Army overseas as a civilian who is charged with a crime in time of peace.

Article 2 of the Uniform Code of Military Justice, 10 U.S.C.A. Sec. 802, reads as follows:

Article 2. Persons subject to this chapter:

The following persons are subject to this chapter:

- (11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States and outside the following: that part of Alaska east of longitude 172 degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands.

The relevant portions of the Constitution under which respondent seeks to sustain the constitutionality of Article 2(11) are Article I, Section 8, Clause 14, which provides that,

"The Congress shall have Power, * * * To make Rules for the Government and Regulation of the land and naval Forces."

and the final clause of Article I, Section 8, which empowers Congress to make all laws which shall be necessary and proper for carrying into execution,

"... the foregoing Powers, and all other Powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

The starting point in any discussion of Article 2(11) is *Reid v. Covert*, 354 U.S. 1 (1957), which for the first time, raised serious doubts concerning court martial jurisdiction over civilians generally, although the case was directly concerned only with dependents in capital cases. That case involved the trial by court martial of a dependent wife for the premeditated murder of her serviceman husband. Justice Black, speaking for himself, the Chief Justice, and Justices Douglas and Brennan, held that the necessary and proper clause could not expand jurisdiction to cover persons not within the terms of Clause 14. Although he did not define the precise boundary between civilians and those in the land and naval forces, he held that dependents were not within Clause 14, and therefore no authority existed for depriving them of their rights as civilians under other provisions of the Constitution. The language of the opinion is broad in certain phases and it appears to embrace civilians generally, without restriction to dependents. Justice Frankfurter concurred in the result, but limited his opinion strictly to dependents in capital cases. He found it necessary to,

"Weigh all the factors involved in these cases in order to decide whether these women dependents are so closely related to what Congress may allowably deem essential for the effective 'Government and Regulation' of the 'land and naval Forces' that they may be

subjected to court-martial jurisdiction in capital cases, when the consequence is loss of the protections afforded by Article III and the Fifth and Sixth Amendments."

In weighing these considerations, he concluded that their proximity to the armed forces was not so clearly demanded for the effective government and regulation of the armed forces as to justify court martial jurisdiction over capital offenses. Justice Harlan also concurred in the result, and on even narrower grounds. He reasoned that Clause 14 was modified by the necessary and proper clause, and that dependents had sufficiently close connection with the proper and effective functioning of our overseas forces to justify court martial jurisdiction. On the other hand, whether an absolute right to the guarantees of the Constitution existed depended on the circumstances, and, in a capital case, those guarantees were so important that the dependents here could not be deprived of them. Justice Clark, with whom Justice Burton joined, dissented. They saw no distinction between capital and non-capital cases, and thought that Article 2(11) was reasonably necessary to the power of Congress to provide for the government of our armed forces. Justice Whittaker took no part in the decision.

The first issue to resolve is whether civilian employees of the armed forces overseas are within the terms of Article I, Section 8, Clause 14 of the Constitution.

62 In a series of early cases, paymaster's clerks were held to be "in military service" for jurisdictional purposes; however, it is noted that these clerks, although not enlisted or drafted, or regular or reserve officers, nevertheless possessed more than the usual indicia of civilian employees. It appears from the cases that they were appointed by the Secretary of the Army or Navy or the commander of the vessel on which they served, that they were paid by the Department of the Army or Navy, and that they even wore a uniform. One case specifically refers to them as officers. They appear, on the facts, to have been comparable to the present class of Department of the Army civilians, with the exception that they wore uniforms. In *re Thomas*, \pm 13,888, 23 Fed. Cas. 931 (DC,

Mass., 1869); *United States v. Bogart*, = 14,616, 24 Fed. Cas. 1184 (DC, N.Y., 1869); *In re Bogart*, = 1,596, 3 Fed. Cas. 796 (CC, Calif., 1873); *In re Reed*, = 11,636, 20 Fed. Cas. 409 (CC, Mass., 1879).

Another series of cases arose out of Article 2(d) of the Articles of War of 1916, 39 Stat. 651, which subjected to military court martial jurisdiction,

"All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles."

In World War I and again in World War II, military court martial jurisdiction over civilians both in the United States and overseas was upheld under the terms of this article. e.g. *Hines v. Mikell*, 259 Fed. 28 (CCA 4th, 1919), cert. den. 250 U.S. 645 (civilian auditor in South Carolina); *Ex parte Gerlach*, 247 Fed. 616 (DC, N.Y., 1917) (civilian mate on an Army transport); *Ex parte Falls*, 251 Fed. 415 (DC, N.J., 1918) (civilian cook on an army transport in New York harbor); *Ex parte Jochen*, 257 Fed. 200 (DC, Texas, 1919) (civilian superintendent of Quartermaster Corps with troops on the Mexican border); *Perlstein v. United States*, 151 F. 2d 467 (CCA 3d, 1945), cert. granted, 327 U.S. 777, dismissed as moot, 328 U.S. 822 (assistant mechanical superintendant employed by private army contractor in Eritrea, Africa, in 1942); *in re DiBartolo*, 50 F. Supp. 929 (DC, N.Y., 1943) (mechanic with Douglas Aircraft Co. in Eritrea, Africa, in 1942); *McCune v. Kilpatrick*, 53 F. Supp. 80 (DC, Va., 1943) (cook on military vessel loading military supplies); *In re Berne*, 54 F. Supp. 252 (DC, Ohio, 1944) (merchant seaman on convoy vessel).

In *Grew v. France*, 75 F. Supp. 433 (DC, Wis., 1948), the defendant had been a mechanical engineer with the Office of the Chief Engineer, U.S. Forces, European Theater, in Frankfurt, Germany, in 1946. The Court held that Article 2(d) was constitutional and that, since Germany was still

a military occupied zone and in a state of war, though hostilities had ceased, there was jurisdiction under either section of Article 2(d). This is a borderline case, but probably should be considered as one of the wartime cases. See also, *United States ex rel. Mobley v. Handy*, 176 F. 2d 491 (CCA 5th, 1949), cert. den. 338 U.S. 904, reh. den. 338 U.S. 904, reh. den. 338 U.S. 945 (civilian post exchange employee arrested in the United States to be returned to Germany for court martial).

On the other hand, a few cases have refused court martial jurisdiction when it was clear that the person attempted to be court martialed was a civilian with no relationship to the armed forces. The first of these cases was *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 107 (1866) where a civilian was arrested in Indiana and tried by a military commission for offenses against the United States committed during wartime. The Court held that there was no jurisdiction on the ground that military tribunals could not constitutionally be substituted for civil courts that were open
64 and operating in the proper and unobstructed exercise of their jurisdiction. It should be noted that the petitioner in this case had no relationship to the military in any way.

Again, in *Ex parte Henderson*, 6,349, 11 Fed. Cas. 1067 (CC. Ky., 1879) the Court struck down as unconstitutional a statute that attempted to confer court martial jurisdiction over a civilian contractor who furnished supplies to the army in the United States.

In only one of the group of World War I cases was military jurisdiction not upheld. In *Ex parte Weitz*, 256 Fed. 58 (DC, Mass., 1919), the defendant was a civilian chauffeur for a contractor doing construction work for the military in Massachusetts, and the Court held that his work had no "direct relation to the transport, maintenance, or supply of an army in the field," although adding that if he had been so employed and within the terms of Article 2(d) of the Articles of War, he would have been subject to court martial jurisdiction. There appears to be nothing inconsistent between this case and the cases cited above for the general proposition.

Finally, in *Duncan v. Kahanamoku*, 327 U.S. 304 (1946), the Court refused to sustain military jurisdiction over a

civilian shipfitter employed by the Navy Yard in Honolulu and over a civilian stockbroker in Honolulu who had no connection with the armed forces.

Under Article 2(11) of the Uniform Code of Military Justice, jurisdiction over civilian employees in peacetime has been directly considered in only four reported opinions; and the first of these was prior to *Reid v. Covert*, *supra*. In the first of these cases, *In re Varney's Petition*, 144 F. Supp. 190 (DC, Calif., 1956), Varney, a Department of the Army civilian in Japan who had been convicted by a general court martial, was denied relief by habeas corpus on four grounds. (1) He had not exhausted all remedies available to him in the military appellate court system. (2) He was within the express terms of Article 2(11) and therefore in a status which did not entitle him to a jury trial. (3) While voluntarily in a foreign country with the Army, he had no right to a trial by jury, on the authority of *In re Ross* (consular court) and the *Insular Cases*. (4) Congress is empowered to authorize trial by court martial of civilians associated with the land and naval forces by virtue of their power under Article I, Section 8, Clause 14, as supplemented by the Necessary and Proper Clause. The Court then reasoned that it was necessary to have jurisdiction over civilians such as the petitioner.

In *Grisham v. Taylor*, 161 F. Supp. 112 (DC, Pa., 1958) (said to be on appeal to the 3rd Circuit and due to be argued soon), petitioner was a Department of the Army civilian assigned to the Corps of Engineers, and on temporary duty in France. He was tried by a general court martial for premeditated murder and found guilty of unpremeditated murder. The Court considered Judge Holtzhoff's opinion in *Giugliardo v. McElroy*, *infra*, the *Toth* case, *infra*, and *Reid v. Covert*, *supra*, concluding with the following holding:

"In the light of the divergent opinions in *Covert* and the self-defeating alternatives, enumerated and evaluated by Mr. Justice Harlan in *Covert* (Note 12, Page 76), I conclude, paraphrasing Mr. Justice Black, *Covert supra*, that this is a circumstance where petitioner was in the armed services for purposes of Clause

14 even though he had not been formally inducted into the military and did not wear a uniform."

The Court added to this that Article 2(11) was constitutional and that civilian employees abroad attached to the armed forces could be subjected to trial by court martial, even in capital cases.

In *United States ex rel. Guagliardo v. McElroy*, 66 158 F. Supp. 171 (DC, D.C., 1958), the petitioner was an electrical lineman employed by the Department of the Air Force in Morocco. He was tried and convicted by a general court martial for a non-capital offense. In an excellent summary of the existing state of the Supreme Court's decisions, Judge Holtzhoff summarized the holdings as follows:

"A former member of the armed forces, who has been discharged and is no longer within the control of the military, is not subject to trial by court martial for an offense committed during his term of service.

A wife, a child, or other dependent of a member of the armed forces is not subject to trial by court martial in a capital case.

The Supreme Court has not determined whether a dependent accompanying a serviceman is subject to trial by court-martial in a case other than capital.

Similarly, the Supreme Court has never had occasion to decide whether a civilian employee attached to the armed forces in a foreign country is subject to trial by court-martial."

The Court then considered the history of the various provisions in military codes that subjected civilian employees to court martial jurisdiction. However, in denying relief to the petitioner, the Court did so on the grounds,

"That a law subjecting personnel of the type involved in this case to trial by court martial is necessary and proper for carrying into execution the power to make rules for the government and regulation of the land and naval forces, is demonstrated by a consideration of the consequences of any conclusion that would deny

this authority to the Congress. It is manifestly essential to enforce law and order at stations maintained by the armed forces of the United States in foreign countries. The use of civilian employees is frequently indispensable in connection with the operation of these stations. If court martial jurisdiction may not be exercised in respect to such civilians, other means of law enforcement would create difficulties that in some instances might prove insuperable."

This decision was reversed by the Court of Appeals for the District of Columbia in the fourth reported opinion on this question, on the ground that the clause "employed by" was

67 not severable from the other clause struck down in *Reid v. Covert*. Therefore, the Court considered itself bound by the decision in *Reid v. Covert*, and did not consider the issue of whether civilian employees could constitutionally be subjected to court martial jurisdiction. Judge Burger entered a strong dissent on the grounds that: (1) The majority result was not compelled by *Reid v. Covert*, because a civilian employee could be either "in" the armed forces in accord with the Black opinion, or that he could be within the Necessary and Proper Clause as suggested by the concurring opinions. (2) There is historic precedent for subjecting civilian employees to court martial jurisdiction whereas there is none for dependents. (3) Clear necessity exists for subjecting civilian employees to court martial jurisdiction. (4) No practical alternative exists. *United States ex rel. Gugliardo v. McElroy*, adv. sheet, Sept. 12, 1958 (DC App., 1958), reversing 158 F. Supp. 171 (petition for certiorari said to be pending before the United States Supreme Court). The logic of this dissent is appealing; it is well reasoned and most convincing and this Court is persuaded to adopt it.

There appears to be a clear distinction between those cases sustaining jurisdiction and those denying it. When the person involved was clearly a civilian with no material relationship to the armed forces, jurisdiction has consistently been denied to the armed forces. On the other hand, when the individual concerned has had a clear relationship to the armed forces, so that he may properly be said to be part of them, jurisdiction has been upheld in all cases

except the last one cited above, where the Court voiced no opinion on the point. The Supreme Court appears to have recognized this distinction. For example, Mr. Justice Black, in *Duncan v. Kahanamoku*, *supra*, speaking for the Court, said at page 313,

"Our question does not involve the well-established power of the military to exercise jurisdiction over members of the armed forces, *those directly connected with such forces*, or enemy belligerents, prisoners of war, or others charged with violating the laws of war." (emphasis added)

At Note 7, for the proposition underlined here, the Court cited *Ex parte Gerlach*, *supra*; *Ex parte Falls*, *supra*; *Ex parte Jochien*, *supra*, and *Hines v. Mikell*, *supra*.

Again, in *United States ex rel. Toth v. Quarles*, 350 U.S. 11, (1955), Justice Black, in the majority opinion to which five other justices subscribed, said, at page 15:

"For given its natural meaning the power granted Congress 'To make Rules' to regulate 'the land and naval Forces' would seem to restrict court martial jurisdiction to persons who are actually members of *part of the armed forces*." (emphasis added)

Finally, in the Black opinion in *Reid v. Covert*, *supra*, the learned Justice said that,

"Even if it were possible, we need not attempt here to precisely define the boundary between 'civilians' and members of the 'land and naval forces.' We recognize that there might be circumstances where a person could be 'in' the armed services for purpose of Clause 14 even though he had not formally been inducted into the military or did not wear a uniform."

The Court then added, however, that dependants were not in this class of persons who could be considered a part of the armed services. Presuming that this language has some meaning, we think it at least recognizes a distinction between those who accompany our armed forces overseas for purposes of convenience only, such as dependants, and those who are so closely aligned with the necessary functioning of our armed forces overseas that they may logically be said to be a part of those forces. This distinc-

tion, based on the relationship of the person concerned to the armed forces, runs through all the cases cited above, and we think it a valid one. Consequently, it is the opinion of this Court that petitioner here was in the armed services for purposes of jurisdiction under Article I, Section 8, Clause 14, of the Constitution.

However, even if it should be considered that the petitioner does not fall within the express terms of Clause 14 for purposes of jurisdiction, this Court is of the opinion that the result arrived at in this case is equally sustainable on other grounds. The parties here are also at issue on the question of whether jurisdiction over a civilian employee overseas can be sustained by virtue of the necessary and proper clause of the Constitution, irrespective of whether that same person is within the terms of Clause 14. This, of course, resolves itself to the issue of whether the necessary and proper clause modifies or extends Clause 14.

First, it should be noted that the Supreme Court in *Reid v. Covert* was equally divided on this question. The four justices in the Black opinion agreed that

"... the Necessary and Proper Clause cannot operate to extend military jurisdiction to any group of persons beyond that class described in Clause 14--the land and naval Forces."

On the other hand, Justice Frankfurter expressed the opinion that the Necessary and Proper Clause was an integral part of Clause 14, and that Congress could therefore sweep in whatever was necessary to make effective the express power of Clause 14. Justice Harlan also disagreed with the Black opinion on this point, and agreed with Justice Frankfurter that the Necessary and Proper Clause was to be taken with Clause 14 and could be used to expand it. The dissent also assumed this to be true, and devoted itself almost entirely to a consideration of whether Article 2(11) was reasonably necessary to the power given Congress by Clause 14.

This Court is disposed to follow the view that "the Necessary and Proper Clause does give Congress power to enact whatever legislation is necessary for the effective government and regulation of our armed forces. This view has been adopted by the other courts that have

considered the question, and it has previously been assumed to be settled law that the Necessary and Proper Clause, as stated by Justice Harlan in *Reid v. Covert*, "is to be read with *all* the powers of Congress." See e.g. *United States ex rel. Guagliardo v. McElroy*, *supra*, at page 178; *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 315 (1819).

The final issue for determination then is whether jurisdiction over civilian employees of the armed forces overseas is necessary for the government and regulation of those armed forces.

Since World War II the troubled international situation has made it necessary for the United States to deploy its armed forces throughout the World, and not infrequently in remote and isolated areas. These forces include a large number of civilian employees, many of whom are technicians and specialists in the fields of electronics, rocketry, atomic energy, aircraft and aircraft weapons. Their relationship to the effective functioning of our armed forces is well known. It is seriously doubted if many of these civilian employees could be replaced by uniformed soldiers, sailors or airmen capable of carrying out the assigned tasks.

In many instances these civilians may very well possess some of this nation's highest and most guarded secrets which are necessary to their employment and to the defense of the free world. Obviously, the military commander must have means to insure control of civilian employees not only for the most effective utilization of their skill, but also to insure the proper utilization and protection of highly classified security information they may possess.

71 The military commander has the primary responsibility of maintaining armed forces in a state of combat readiness to meet any eventuality. He has the further responsibility of operating his military community in such a way as to give the best possible impression of the United States to the people in foreign areas. To discharge these responsibilities the commander must have some control over the activities of his charges both uniformed and non-uniformed. These civilian employees usually enjoy the privileges and benefits received by the military; and nearly every essential of their daily living and activities is interwoven with those of the military. Considered realistically, these civilian employees are a part of our

armed forces overseas. The question here is not simply whether military or Article III civil courts should have jurisdiction. In many cases, if not in all cases, the realities of the situation reduce it to a question of whether anyone should have jurisdiction. A variety of alternatives to military jurisdiction have been proposed and fully considered. See e.g. Note 12 on page 76 of Justice Harlan's opinion in *Reid v. Covert*; 71 *Harvard Law Review* 712. None have been found or even proposed that are wholly satisfactory and serious doubt exists that any of them would work at all. Even if certain alternative solutions were available in certain situations, such as trial in a civil court, these solutions would seriously diminish a local commander's effectiveness in maintaining law and order on his post, and could even greatly lessen the security of the post itself. Without the power of disciplinary action over these civilians the commander's efforts to successfully fulfill his mission in a foreign land would be seriously impaired.

72 Certainly it cannot be said that these considerations are irrelevant in determining whether jurisdiction over civilian employees overseas is necessary to the effective government and regulation of our armed forces. Therefore, it is the conclusion of this Court that Congress may, under the authority of the Necessary and Proper Clause, provide for court-martial jurisdiction in non-capital cases over others than uniformed members of our armed forces when necessary for the effective government and regulation of those armed forces. It is also the conclusion of this Court that court martial jurisdiction in non-capital cases over civilian employees of the armed forces in foreign lands is necessary for the effective government and regulation of our armed forces.

The Order to show cause is discharged and the petition is dismissed.

Dated at Denver, Colorado, this 10th day of November, A. D. 1958.

By the Court:

ALFRED A. ARRAJ

Alfred A. Arraj

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil No. 6161

(File Endorsement Omitted)

Notice of Appeal—Filed Dec. 2, 1958

Notice is hereby given that Bruce Wilson, the petitioner above named, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the Memorandum Opinion and Order entered in this action on November 10, 1958.

Major General John F. Bohlander, Commander, Fitzsimons Army Hospital, Denver, Colorado, is designated as the appellee.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH JUDICIAL CIRCUIT

Sitting at Denver, Colorado

Twenty-Second Day, November Term, Tuesday,

December 23rd 1958

PRESENT: Honorable Jean S. Breitenstein, Circuit Judge,
And other officers as noted on the 17th day of November, 1958.

Before HONORABLE SAM G. BRATTON, *Chief Judge*,

BRUCE WILSON, *Appellant*,

6063

vs.

MAJOR GENERAL JOHN F. BOHLANDER, Commander, .
Fitzsimmons Army Hospital, *Appellee*.

Appeal from the United States District Court
for the District of Colorado

This cause came on to be heard on the application of appellant for leave to docket the cause as a poor person; that a copy of the certified transcript of the record from the United States District Court be certified to the Supreme Court of the United States, together with petitioner's exhibit 1, duly certified; and that further action herein be held in abeyance.

On consideration whereof, and for good cause shown, it is ordered that said application be and the same is hereby granted and that appellant may docket the cause instantly without being required to prepay fees or costs or to give security therefor.

It is further ordered that the clerk of this court transmit to the Supreme Court of the United States a certified copy of the record from the United States District Court for the District of Colorado, together with petitioner's exhibit 1, duly certified; and that further action by this court be held in abeyance.

It is further ordered that the clerk of this court forthwith transmit to the clerk of the Supreme Court of the United States a certified copy of this order.

A true copy as of record,

Clerk's Certificate (U.S.C. 10th Circuit)

United States Court of Appeals, Tenth Circuit.

I, Robert B. Cartwright, do hereby certify the foregoing as a full, true and complete copy of the transcript of record from the United States District Court for the District of Colorado had and filed in the United States Court of Appeals for the Tenth Circuit, in a certain cause, No. 6063, wherein Bruce Wilson is appellant, and Major General John F. Bohlander, Commander Fitzsimmons Army Hospital, is appellee, as full, true and complete as the original transcript of record remains on file in my office.

I do further certify that no action has been taken in said cause by the United States Court of Appeals for the Tenth Circuit, other than the entry of an order docketing the cause in forma pauperis.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Court of Appeals for the Tenth Circuit, at my office in Denver, Colorado, this 23rd day of December, A. D. 1958.

ROBERT B. CARTWRIGHT,
*Clerk of the United States
Court of Appeals, Tenth
Circuit.*

By GEORGE A. PEASE
Chief Deputy Clerk.

Order Granting Motion for Leave to Proceed In Forma Pauperis and Petition for Certiorari—Feb. 24, 1959

On petition for writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 725, placed on the summary

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 37

BRUCE WILSON,

Petitioner,

v.

MAJOR GENERAL JOHN F. BOHLENDER,

COMMANDER, FITZSIMONS ARMY HOSPITAL

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

BRIEF FOR THE PETITIONER

Opinions Below

The opinion of the District Court (R. 60-72) is reported at 167 F. Supp. 791. The opinion of the United States Court of Military Appeals sustaining military jurisdiction over the petitioner (R. 53-60) is reported at 9 USCMA 60 and 25 CMR 322.¹

¹ The same system of military law abbreviations set forth in Appendix A of the appellee's brief in *Singleton* (No. 22) is used throughout the present brief.

Jurisdiction

The order of the District Court denying the petition for a writ of habeas corpus was entered on November 10, 1958 (R. 72). A notice of appeal to the United States Court of Appeals for the Tenth Circuit was filed on December 2, 1958 (R. 73), and the record on appeal was docketed in that court on December 23, 1958 (R. 74). The case has not been heard, submitted to, or decided by the Court of Appeals. The petition for a writ of certiorari was filed on December 30, 1958, and granted on February 24, 1959 (R. 75), at which time petitioner's motion to proceed *in forma pauperis* was also granted (R. 75; 359 U.S. 906). The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

Questions Presented

1. Whether a civilian employee of the armed forces may constitutionally be tried by court-martial overseas in time of peace for a non-capital offense.
2. Whether petitioner's trial by court-martial can be sustained on the basis that it represented an exercise of military government jurisdiction in occupied Berlin.

Constitutional Provisions and Statutes Involved

The constitutional and some of the statutory provisions involved appear at pp. 2-4 of respondent's brief herein. Additional statutory provisions referred to throughout the argument are set forth in Appendix B of the *Singleton* brief in No. 22.

Statement

Petitioner, an American citizen, was a civilian employee of the Department of the Army assigned to the Comptroller Division, Berlin Command, in the United States Sector of Berlin (R. 1). He went to Berlin on a passport accrediting him to the United States Army Commander in Berlin, and entered and departed from Berlin from time to time pursuant to military orders during the term of his employment. He, like other civilian employees of the Army in Berlin, was supplied with military housing and exchange facilities (R. 49).

Prior to 1956, he had an excellent record in Federal civilian employment (R. 40-42). In June 1956, when he was 52 years old (R. 26, 29), he was served with charges preferred under the Uniform Code of Military Justice accusing him of various offenses that were wholly non-military in nature (R. 19-22), viz., three acts of sodomy in violation of Art. 125, UCMJ (50 U.S.C. [1952 ed.] §719), and accusing him also of two lewd and lascivious acts with persons under the age of sixteen, and with twice displaying lewd and lascivious pictures to minors with intent to arouse their sexual desires, the latter all in violation of Art. 134, UCMJ (50 U.S.C. [1952 ed.] §728).

One day before the trial, in August 1956, petitioner tendered his resignation from federal employment, but it was not accepted (R. 29-30, 47, 49, 51, 57).

At the trial, on August 21, 1956 (R. 16)—after the first *Covert-Krueger* opinions but before the second ones following rehearing—petitioner entered a plea to the juris-

² Inasmuch as all of the offenses charged were committed prior to the effective date of the 1956 revision of Title 10, U.S.C., we cite only the earlier U.S.C. reference. The substantive content of the Articles in question was not changed in the revision.

diction of the court-martial on the ground that he was a civilian; this plea was overruled after argument (R. 24, 47-52).

Thereupon petitioner pleaded guilty to all the charges and specifications (R. 24), and was duly found guilty accordingly (R. 26).

In the proceedings to determine the sentence, petitioner introduced two stipulations (Def. Ex. D and E; R. 43-46) as to expert testimony concerning his mental condition:

Dr. Jaffe, a German civilian psychiatrist who examined petitioner, would have testified after setting forth his findings that (R. 45) petitioner "should therefore be considered a psychopathic personality on the borderline of schizophrenia."

The other, Capt. Bertram, an American military psychiatrist, concluded (R. 46) that "although Mr. Wilson is not psychotic, he is a psychopathic personality tending toward and on the borderline of schizophrenia."

Both experts stated that petitioner was legally responsible, and able to understand the proceedings and to cooperate in his defense (R. 44, 46).

The maximum penalty for the offenses with which petitioner was charged was confinement at hard labor for 29 years and 8 months (R. 38); the court-martial sentenced him to confinement at hard labor for ten years (R. 39), which the convening authority on review cut to five (R. 8).

After affirmance by a Board of Review (R. 54, 60), the Court of Military Appeals sustained the jurisdiction of the court-martial on the ground that, as applied to petitioner's case, Art. 2(11), UCMJ, was constitutional, notwithstanding anything held in *Reid v. Covert*, 354 U.S. 1 (R. 53-60; 9 USCMA 60, 25 CMR 322). The court said in footnote 1

of its opinion (R. 55), "We prefer to reach the question of jurisdiction in this case under the provisions of subdivision 11 of Article 2 rather than consider whether the circumstances obtaining in Berlin constitute that area occupied territory, as contended by Army Government counsel."

The Court of Military Appeals suggested (R. 55), apparently on the basis of the jurisdictional argument at the trial (R. 50), that petitioner "was not subject to the civil or criminal jurisdiction of the Berlin courts by virtue of the provisions of Allied Kommandatura Law No. 7."

Meanwhile, petitioner had been confined in no less than five military institutions (R. 2, 8, 11, 12, 13, 14), the last one being Fitzsimons Army Hospital in Denver, Colorado (R. 1, 5, 10).

While there, he brought the present habeas corpus proceeding, naming the commander of that installation as respondent (R. 1-3).

The district judge denied the petition (R. 60-72), essentially on the grounds set forth by the Court of Military Appeals. The district judge specifically refused to follow the decision of the District of Columbia Circuit in the *Guagliardo* case, now No. 21, this Term, preferring the views of the dissenting judge therein (R. 67-68).

Nothing was said by the district judge regarding the Berlin-occupied territory issue, which was presented by respondent as an alternative ground for denying the writ.

By leave of court, petitioner appealed to the United States Court of Appeals for the Tenth Circuit *in forma pauperis* (R. 73), and perfected his appeal by lodging the record there (R. 74).

³ See, however, Resp. Br. 20-21, and p. 100, *infra*.

He sought, and this Court granted, certiorari before judgment in the court below (R. 75-76); and his motion to proceed *in forma pauperis* was also granted (359 U.S. 906).

Summary of Argument

I. Art. 2(11), UCMJ, is separable, so that the constitutional issue in this case must be decided; the argument on this point in the *Singleton* case, No. 22, is incorporated by reference.

II. The prerequisite to the exercise of military jurisdiction is that the accused have a military status, and consequently, with a narrow wartime exception not here applicable, no civilian can constitutionally be tried by court-martial in time of peace regardless of his relationship to the military. On this point also the argument in *Singleton* is incorporated by reference, and here it is significant that in 1957 the Government argued that "For purposes of court-martial jurisdiction, there is no valid distinction between civilians employed by the armed forces and civilian dependents."

III. Apart from a limited number of essentially episodic instances, many of them flagrantly illegal on their face, there is no basis whatever in either history or practice for the peacetime military jurisdiction over civilians employed by or accompanying the forces that is now sought to be asserted.

A. Accurate evaluation of the available military historical materials requires distinctions that the Government's discussion fails to make.

1. First of all, it is necessary to differentiate between episodic instances that reflect only the acts of subordinates

and a settled course of official rulings that represent the considered judgment of higher authority.

2. Next, it is necessary to differentiate between (a) trials by court-martial of civilians accompanying the forces "in the field" in time of war or actual hostilities, which are clearly legal; (b) similar trials in time of peace in areas where no system of civil judicature was in operation, the jurisdiction now in dispute; (c) similar trials in time of peace in areas where the civil courts were functioning, the legality of which the Government does not attempt to defend; and (d) similar trials of civilians wholly unconnected with the forces, which were always illegal.

3. It is similarly necessary to differentiate between war-time military jurisdiction over civilians who aid the enemy or who violate the laws of war, see *Ex parte Quirin*, 317 U.S. 1, and peacetime military jurisdiction over civilians committing ordinary offenses, which is in question here.

4. It is likewise necessary to differentiate between military regulation of civilian activities in the military camp, violation of which may lead to dismissal from employment or ouster from the camp, and the exercise of military jurisdiction through trial by court-martial of civilians who offend against those regulations.

5. Next, it is necessary to distinguish between the power of a court-martial to punish a civilian for obstructing its processes and the power of such a tribunal to try and punish a civilian for committing a military offense. From 1786 to 1901, a civilian who failed or refused to testify before a court-martial violated no law, and in the last named year such acts were made, as they have since remained, purely civil offenses. And the traditional power of a court-martial to punish all contemners, regardless of

status, does not constitute any exercise of military jurisdiction.

6. It is further necessary to distinguish between persons with civilian status and those who though soldiers bore apparently civilian titles. Musicians, mechanics, farriers and the like were purely soldiers. Some artificers were soldiers, others may have been civilians. But American artillerymen were always soldiers.

7. British analogies must be used with caution, for while American military forces were always under the control of Congress, Parliament seems not to have governed the British Army outside the realm until early in the XIX Century; such control before then was vested solely in the Crown.

8. American naval precedents furnish uncertain guides, primarily because the Articles for the Government of the Navy contained no provision concerning accompanying civilians such as the Articles of War did. Indeed, Congress conferred no such jurisdiction until 1943, and then limited it to time of war or national emergency. Consequently the holding of *Johnson v. Sagre*, 148 U.S. 109, is, not that the Navy could try civilians by court-martial, but only that a Navy paymaster's clerk was a person in the naval service.

B. The only known English ruling from the XVIII Century held that there was no military jurisdiction over accompanying civilians in time of peace. *Mostyn v. Fabrigas*, 1 Cowp. 161, 175-176. And the British Parliament in 1765 refused to empower military commanders in the North American wilderness to try civilians by court-martial. St. Geo. III, c. 33, XXV; see discussion in *Singleton* brief.

C. The many military trials of civilians by the Continental Army during the Revolutionary War do not support the peacetime military jurisdiction now asserted. The civilian officials then tried were plainly serving in time of war and "in the field"; the other civilians were either spies, or else inhabitants, tried not under the Articles of War but under special resolves of Congress.

D. Military trials of civilians in the 1790s, at a time when there was endemic conflict between the military and civilian authorities, reflect primarily illegal assertions of military power, and do not establish any authoritatively settled practice, such as the Government now urges, of exercising military jurisdiction only over civilians actually with the army in areas where there is no civil jurisdiction.

1. These trials include some "in the field"—plainly legal; some of civilians not connected with the army at all—plainly illegal; some of accompanying civilians in settled communities—not now sought to be defended; and some of accompanying civilians in the wilderness.

2. These trials, therefore, reflect not a settled legal practice, but simply show the nature of and reason for the conflict between military officers and civil officials that characterized the American frontier in the 1790s. Moreover, the civilian status of about a quarter of the persons whose trials are listed is not clear. And the obvious abuses of authority on the part of the military commanders concerned militate against considering any of their actions as reflecting a consistent course of constitutional interpretation.

3. Many incidents of these trials—their obvious irregularities, the consistent brutality of their sentences—are not such as to establish their legitimacy.

4. None of the foregoing trials were ever approved by higher civil authority; to the contrary, they appear to violate policies formulated by civil authority, notably by President Washington himself. There is no evidence that any of them ever came to the attention of Congress, which long postponed a revision of the Continental Articles of War in order to make them conform to the subsequently adopted Constitution.

5. The foregoing trials are not a safe guide to constitutional interpretation, and were moreover (see Appendix D) regarded contemporaneously as having taken place in time of war.

E. The peacetime military jurisdiction exercised over civilians from 1825 to 1860 was episodic in the extreme—seven such trials in all—and similarly reflected illegality rather than authoritative constitutional interpretation, inasmuch as many of them took place where civil courts were operating.

F. Extensions of military jurisdiction during the Civil War must be regarded with caution; *Ex parte Milligan*, 4 Wall. 2, exposed the patent unconstitutionality of Judge Advocate General Holt's military trials of civilians. He is accordingly not a safe guide as to the extent of military jurisdiction. Nor was the 37th Congress, which enacted the recapture provision ultimately condemned in *Toth v. Quarles*, 350 U.S. 11, as well as the plainly unconstitutional military jurisdiction over contractors.

G. Present-day boundaries are fixed, not by the sporadic excesses of the past, but by the considered rulings of the Government's law officers—the Attorney General and The Judge Advocate General of the Army—which condemned those excesses as illegal and unconstitutional.

H. The fact that after three and a half years the Government still accords silent treatment to The Judge Advocate General's post trader ruling is eloquent testimony to the importance of that ruling in the present connection.

I. No constitutional justification was ever offered in 1916 for the extension of military jurisdiction then enacted at General Crowder's urging, nor did he even suggest the existence of a constitutional question. He seems to have rested his proposal on two inarticulate premises: first, that the Constitution did not apply to the acts of American officers overseas; second, that the Fifth Amendment granted court-martial jurisdiction over "cases arising in the land or naval forces." Both of these premises have since been authoritatively disapproved: *Balzac v. Porto Rico*, 258 U.S. 298, 312; *Toth v. Quarles*, 350 U.S. 11, 14.

J. On the only occasions from 1793 to 1916 when the Attorney General and The Judge Advocate General of the Army gave reasoned consideration to the question whether trials of civilians by court-martial in time of peace contravened constitutional limitations, they answered that question with a resounding affirmative. In 1866, Gen. Holt submitted a brief memorandum that did not mention the Constitution, nor did Gen. Crowder in 1916 discuss any constitutional question. The only reasoned discussions came in 1877, when The Judge Advocate General of the Army recalled the constitutional boundaries of military power to the Attorney General, who had momentarily overlooked them; see full text in Appendix C.

IV. No controlling or indeed persuasive judicial authority sustains the peacetime military jurisdiction over civilians that is now asserted.

A. What was said in *Duncan v. Kahanamoku*, 327 U.S. 304, 313, was dictum on its face and moreover referred only to wartime cases.

B. The lower court cases relied on are either not in point, because involving military jurisdiction exercised in wartime; or else unpersuasive. All but one of the decisions dealing with peacetime jurisdiction antedate *Reid v. Covert*, 354 U.S. 1, and that one cites the withdrawn opinions therein.

V. The Government's arguments as to the alleged necessity of trying civilian employees by court-martial and the alleged lack of acceptable alternatives are incomplete to the point of being misleading. Under this heading we incorporate by reference, from the *Singleton* brief in No. 22, the discussion regarding the basic inconsistency between *Wilson v. Girard*, 354 U.S. 524, and the contentions now being made in support of the military jurisdiction, as well as the suggestion that the Court should call for the production of named recent agreements with foreign countries that appear to cast doubt on assertions now being made.

A. The Government omits to advise the Court that the reason why so many civilian employees are now accompanying the armed forces abroad is purely budgetary—a fact easily established by reference to legislation, committee reports, and appropriation hearings.

B. The Government omits to explain to the Court why, if its civilian employees must be subjected to military discipline, they cannot be incorporated in the armed forces, either voluntarily, by enlistment or commissioning, or, if need be, by draft—as the doctors are.

C. The cases of the civilian employees now before the Court fail to establish any inseparable connection between them and their offenses and the military forces.

1. Grisham, of No. 58, a cost accountant on the payroll of the U. S. District Engineer at Nashville, came to France, rented an apartment in the City of Orleans, and a few weeks later killed his wife there after a cocktail party. He was then held in French custody for over two weeks. Why his offense could not have been treated like any other homicide by an American on French soil, viz., by trial in a French court, is not explained.

2. The present petitioner, described by two doctors as "a psychopathic personality on the borderline of schizophrenia," pleaded guilty to a series of sexual offenses. If those had been committed in the District of Columbia, he would pursuant to Congressional direction have been committed to Saint Elizabeths Hospital as a sexual psychopath. What military reason requires that he be tried by court-martial and then confined for five years in a penitentiary?

3. Guagliardo, of No. 21, was charged with committing two offenses against the United States—larceny and conspiracy—so that Title 18 reached him and he could have been flown back to the United States for trial. He also was held by the local civil authorities. Nowhere is there offered a convincing explanation why his acts could only have been dealt with by an Air Force court-martial.

D. The contentions in support of the jurisdiction simply repeat what was said in 1956 and 1957 and fail to reflect any genuine effort to restudy the problem of law enforcement in respect of civilian employees overseas beyond

"Let's see if we can't keep *Reid v. Covert* limited." Not even the espionage chapter of Title 18 has been amended to reach security violations by such employees abroad. The basic approach is still that of the Army Board of Review in the *Singleton* case, that "the necessity for military jurisdiction" is sufficient to overcome the requirements of Article III and the Fifth and Sixth Amendments."

VI. Even on the assumption that Berlin is still occupied territory, for all purposes, petitioner's trial by court-martial cannot be sustained as an exercise of military government jurisdiction over him. We will assume that Berlin continues under military occupation, and of course military trials may validly be held in such territory.

A. But the Army did not purport to exercise military government jurisdiction over petitioner, his trial was never sustained at any stage on that basis, and it cannot be converted into a military government trial now.

1, 2. Petitioner's status was set forth in the charges preferred against him in terms drawn from Art. 2(11), UCMJ; he was not described either as "a person resident in occupied territory" or as "a person subject to the law of war." And military jurisdiction over him was sustained on that basis; the Court of Military Appeals refused to consider the occupied territory issue. Nor did the habeas corpus court proceed on that basis.

3, 4. It is now too late to invoke the alleged alternative jurisdiction. While the military rule, like the civil one, is that mis-citation of the statutory provision being violated is immaterial, military law nonetheless has consistently held that jurisdiction must be shown to exist at the outset, and that it cannot be supplied by subsequent ratification.

Therefore, once it is conceded that Art. 2(11), under which petitioner was tried as an accompanying civilian, could not validly reach him, then his trial by court-martial cannot be retroactively validated under Art. 18 on the theory that he was simply a resident of occupied territory and as such subject to the law of war.

5. The contrary holding of the Court of Military Appeals in *Schultz*, 1 USMA 512, which rests on the supposed authority of *Givens v. Zerbst*, 255 U.S. 11, cannot be supported. The *Givens* case held that the truth of jurisdictional averments in a court-martial record could be independently established on collateral attack, even though they were not otherwise proved in the court-martial proceedings. The *Givens* case did not hold that, jurisdiction being collaterally challenged, new allegations of jurisdiction that would change the court-martial record could then be substituted and sustained.

6. Of course military trials may validly be held in occupied territory. But no military government jurisdiction was in fact exercised in this case.

B. Indeed, no military government jurisdiction has been exercised in Berlin by the United States since May 5, 1955; there are now no occupation courts there.

C. It follows that any attempt now to exercise a military government jurisdiction limited to American civilians accompanying the armed forces abroad, at the same time excluding German nationals and all other residents of other nationality not connected with the armed forces, would be discriminatory and hence invalid. *Yick Wo v. Hopkins*, 118 U.S. 356; *Griffin v. Illinois*, 351 U.S. 12, 17. The Due Process Clause limits even the war power. *United States v. Cohen Grocery Co.*, 255 U.S. 81.

The discrimination issue will probably not be reached, inasmuch as the military authorities, through and including the Court of Military Appeals, proceeded on the basis that an Art. 2(11) jurisdiction was being exercised.

It should be added that the terms of Allied Kommandatura Law No. 7 specifically provide for an authorization to German courts to try American civilians who accompany the armed forces. Hence a holding that such civilians were not triable by court-martial would in no sense mean that their misdeeds would go unpunished.

A R G U M E N T

I. Fairly Construed, Article 2(11) of the Uniform Code of Military Justice Is Separable, So That the Constitutional Issue in This Case Must Be Decided.

If the District of Columbia Circuit in the *Guagliardo* case, No. 21, this Term, was correct in holding that Art. 2(11), UCMJ, is not separable, so that its application to a civilian employee charged with a non-capital crime "cannot be validly carved out of the invalid general spread of that provision" (R. 41, No. 21), then the judgment below in this case, which similarly involved a civilian employee charged with a non-capital crime, must be reversed—unless the Government can show that the present trial was a valid exercise of military government jurisdiction, which, as we indicate below, pp. 90-100, it cannot do.

We believe, however, that Art. 2(11), UCMJ, properly construed, is separable, and that the Court accordingly is required to decide the constitutional issue. On that point, petitioner adopts and incorporates the arguments made on behalf of the relator in the *Singleton-Dial* case; see appellee's brief in No. 22, at pp. 16-23.

II. The Prerequisite to the Exercise of Military Jurisdiction Is That the Accused Have a Military Status, and Consequently (With a Narrow Wartime Exception Not Here Applicable) No Civilian Can Be Constitutionally Tried by Court-Martial Regardless of His Relationship to the Military.

Petitioner's basic position is that, because he was a civilian at all material times, without military status, he was not amenable to trial by court-martial in time of peace.

In order to shorten what at best must necessarily be a long brief, petitioner adopts and incorporates by reference the arguments made on behalf of the relator-appellee in the *Singleton-Dial* case, No. 22, with reference to—

A. The matters decided by *Reid v. Covert* and consequently foreclosed here (pp. 24-27);

B. The inapplicable exception subjecting to military law civilians who in time of war are with the armed forces "in the field," i.e., at a time and in the area of military operations against an enemy (pp. 28-33);

C. The general proposition that military jurisdiction depends on military status (pp. 34-38); and

D. The proposition that the Necessary and Proper Clause does not expand Clause 14 so as to include civilians within "land and naval Forces" (pp. 81-103).

Accordingly, petitioner's arguments under the present heading are restricted to one narrow but decisive issue, viz., that for purposes of court-martial jurisdiction there is no difference between civilian dependents and civilian employees.

On that issue, we vouch to warranty one of the Government's basic arguments at the *Covert* rehearing (Supple-

mental Brief for Appellant and Petitioner on Rehearing, Nos. 701 & 713, Oct. T. 1955, Point ID, pp. 37-40), viz., that—

"For purposes of court-martial jurisdiction, there is no valid distinction between civilians employed by the armed forces and civilian dependents."

The Government still appears to be making the same argument today, contending in *Guagliardo* (No. 21) that all civilian employees are triable by court-martial, and urging in *Singleton* (No. 22) that all civilian dependents are similarly triable. Any difference between the two arguments seems to be primarily one of emphasis and fervor; a consecutive examination of the Government's briefs in the two cases leads the reader to infer that The Pentagon is more concerned with military jurisdiction over employees than over dependents.

But that is only an inference; there is no admission that any difference exists between the two classes; and there is no disclaimer of the Government's 1954 position, quoted above. Accordingly, we await with interest the documentation of the announcement (Pet. Br., No. 21, p. 27, note 8) that "The Government does not concede that a civilian employee charged with a capital offense is not amenable to court-martial under the Constitution. See *Grisham v. Hays*, No. 58, this Term."

We believe the factor of civilian status to be decisive in all four cases. And, while we are prepared to incorporate by reference the legal arguments made on behalf of Mrs. Dial in No. 22, in support of that proposition, the history of asserted military jurisdiction over civilian employees is replete with so many more instances that separate treatment of the pertinent historical materials is required in this case.

III. Apart From a Limited Number of Essentially Episodic Instances, Many of Them Flagrantly Illegal on Their Face, There Is No Basis Whatever in Either History or Practice for the Peacetime Military Jurisdiction Over Civilians Employed by or Accompanying the Forces That Is Now Sought to Be Asserted.

This portion of our brief will, unavoidably, be rather long. The fact is—and we say so quite dispassionately, without either heat or resentment—that neither the historical materials adduced by the Government nor the interpretations drawn therefrom in the endeavor to establish a “solid basis” for the exercise of military jurisdiction over civilians, are reliable in any degree.

The materials are incomplete, the inferences drawn therefrom are inaccurate because important distinctions are overlooked, and evidence of authoritative practice in the form of published official rulings is entirely ignored, it would appear systematically so.

We do not propose to make a series of debating points in the pages that follow. Our primary aim in the discussion below is to assist the Court in making an accurate and historically sound evaluation of all available materials, first by emphasizing significant distinctions that serve as guidelines, and then by adducing a mass of additional instances drawn primarily from original sources, many of them still available only in manuscript. Thus, in Appendix A we list more than three times again as many civilians tried by court-martial during the Revolutionary War than the Government cited, while in Appendix B we note numerous instances of military trials of civilians in the 1790's that are not mentioned by the Government at all.

We believe, therefore, that our strictures directed at the unreliability of the Government's “history” cannot fairly be characterized as epithetical, and that they will be found

to be fully supported by the detailed analysis and documentation that follow.

- A. *Accurate evaluation of the available military-historical materials requires distinctions that the Government's discussion fails to make.*

Maitland, the greatest of legal historians, noted that Lord Coke obtained a copy of *The Mirror of Justices*, "and, as his habit was, devoured its contents with uncritical voracity. * * * It would be long to tell how much harm was thus done to the sober study of English legal history." *The Mirror of Justices* (Selden Soc., vol. 7, 1893) xi-x.

* The Government has similarly devoured uncritically such historical materials as it presents (Pet. Br., No. 21, pp. 28-61), and in consequence correction of the errors therein also requires a lengthy screed. At least eight vital distinctions are overlooked in the cited discussion, a circumstance that substantially impairs the validity of the conclusions there reached.

1. *It is necessary to differentiate between episodic instances reflecting only the acts of subordinates and a settled course of official rulings representing the considered judgment of higher authority.*

It should hardly be necessary to labor the proposition that the considered judgment of higher authority, reached after mature deliberation, is entitled to more weight in determining the legality of a challenged practice than are earlier instances of action by subordinates that were not submitted to superiors for approval or disapproval.

Yet here the Government appears to place more reliance on scattered episodes than on the subsequent authoritative condemnation of a practice. It relies on 7 trials of sutlers

and the like from 1825 to 1858 (Pet. Br., No. 21, p. 56, note 27), and gives those instances more weight than any of the later Judge Advocate General's opinions to the contrary (*infra*, pp. 65-70), many of which it refuses even to cite. Otherwise stated, the argument seems to be that a jurisdiction sporadically and episodically exerted, without legal scrutiny, establishes the incorrectness of subsequent formal legal opinions which held that this jurisdiction could not be legally exercised.

A fair parallel would be an attempt to demonstrate the legality of trials by military commissions during the Civil War by citing the instances collected in Dig. Op. JAG, 1868, pp. 225-232, and by disregarding their condemnation in *Ex parte Milligan*, 4 Wall. 2, and the consequent elimination of those "precedents" from the 1880 edition of the same Digest.

2. *It is necessary to differentiate between (a) trials by court-martial of civilians accompanying the army "in the field" in time of war or actual hostilities, (b) similar trials in time of peace in areas where no system of civil judicature was in operation, (c) similar trials in time of peace in areas where the civil courts were functioning, and (d) similar trials of civilians wholly unconnected with the forces.*

In disregard of a whole series of published rulings (which it does not cite), the Government (Pet. Br., No. 21, pp. 52-61) insists that the "in the field" limitation is invalid, and that historical evidence establishes the validity of military trials of civilian employees in areas where no system of civil judicature was in operation.

For reasons already set forth in the *Singleton* brief in No. 22 (and further developed below, pp. 65-70), we

cannot agree that the limitation to "in the field" is capable of thus being ignored and attempted to be verbalized away.

Moreover, in evaluating the persuasive worth of military trials of civilian employees in time of peace, we think it essential to distinguish between those that took place in the wilderness, where the civil courts were not functioning; those that occurred in settled communities, where judicial process ran unimpeded; and those of civilians having no connection whatever with the forces. Certainly the fact that one sutler was tried at Fort Monroe in 1825 and another at Fort Washington, Maryland in the same year (Pet. Br., No. 21, p. 56, note 37) is no precedent for a like trial today, but simply evidence of earlier disregard of the Sixth Amendment. Similarly, the military trials *tempore* Generals Wayne and Wilkinson of civilians unconnected with the Army (*infra*, page 39, and Appendix B), do not infuse such performances with constitutional validity, then or now. And, as we point out in detail below, the numerous similar instances reflect, not a settled military jurisdiction limited to areas where the civil courts could not operate, but a failure on the part of the Army to restrict itself within constitutional boundaries, failure which, as will be shown, resulted in sharp conflicts with civil authority.

3. *It is necessary to differentiate between wartime military jurisdiction over civilians who aid the enemy, and peacetime military jurisdiction over civilians committing ordinary offenses.*

The citation in the argument for the military jurisdiction of the conviction of a civilian by Continental court-martial in 1778 for the offense of counterfeiting (Pet. Br., No. 21, note 25 at p. 41, citing 13 *Writings of Washington* 54), and AW 56 and 57 of 1806 (same brief, note 31, pp. 48-49), blurs a vital distinction between peace and war.

Spies are triable by military tribunal because they violate the laws of war. *Ex parte Quirin*, 317 U.S. 1. They cannot be so tried once the war is over. *Matter of Martin*, 45 Barb. 142, 31 How. Pr. 228.

We show below that the inhabitants tried by court-martial in the Revolutionary War for aiding the enemy in various aspects were, as Washington himself recognized, not tried under the Articles of War. And AW 56 and AW 57 of 1806 that denounced relieving and corresponding with the enemy simply carried forward that purely wartime jurisdiction, which has continued over the years. See AW 45 and AW 46 of 1874; AW 81 of 1916 through 1948; Art. 104, UCMJ; and note Winthrop's showing that this jurisdiction cannot be exercised in time of peace (*138-*142). After all, there being no public enemy in peacetime, the cited provisions at such a period are inoperative by their very terms. The cited articles represent, preeminently, an exercise of the war power, and are thus wholly inapposite here.

4. *It is necessary to differentiate between the military regulation of civilian activities in the military camp, and the exercise of military jurisdiction over civilians who offend against those regulations.*

The argument in favor of the military jurisdiction must, to be persuasive, distinguish between a military regulation of civilians, and military jurisdiction over civilians who violate such regulations as are made.

Today, in very large measure, military commanders regulate the conduct of civilians on their posts in the United States in connection with a variety of activities. Familiar examples are duties relating to facilities such as post exchanges, laundries, restaurants, theaters, and the like. Violation of the applicable regulations may, in proper cases,

lead to a termination of the offending civilian's further employment. But it does not follow for a moment that such civilian employees are subject to trial by court-martial.

Consequently the citations of the early Articles of War regulating the conduct of suttling under pain of dismissal from further suttling (Br. Articles of 1765, Sec. VIII, Art. 1; AW LXIV of 1775; Sec. VIII, Art. 1, of 1776; see Pet. Br., No. 24, p. 33, note 16; p. 36, note 22) are obviously irrelevant.

In this connection it is to be noted that one of the avowed purposes of the 1916 revision of the Articles of War was the elimination of these and similar essentially regulatory provisions, that were more appropriately set forth in Army Regulations, and had no place in a punitive code. See Sen. Rep. 130, 64th Cong., 1st sess., pp. 18, 20, 28, 400.

5. *It is necessary to distinguish between the power of a court-martial to punish a civilian for obstructing its processes and the power of such a tribunal to try and punish a civilian for committing a military offense.*

Much appears to be made, to the extent of speaking of "the broad view which the Continental Congress had of the reach of the court-martial power" (Pet. Br., No. 21, p. 37, note 23), of the circumstance that the earliest codes gave courts-martial power to punish civilians for contempt and for refusing to testify (AW XI of 1775; AW LIV of 1775; Sec. XIV, Arts. 6 and 14, of 1776; see Pet. Br., No. 21, pp. 35-36).

Here again, vital distinctions are being blurred.

(a) AW LIV of 1775 and later Sec. XIV, Art. 6, of 1776, gave to courts-martial power to punish civilians who refused to testify before them when duly called upon to do so.

The Government fails to point out that when, in 1786, Sec. XIV of the Articles of War was amended, the latter provision was repealed.

Therefore, from 1786 until 1901, the failure or refusal of a civilian to testify before a court-martial was not declared criminal by Congress. Finally, in 1901, it was made an offense triable in the civil courts. Sec. 1 of the Act of March 2, 1901, c. 809, 31 Stat. 950; see H.R. Rep. 1853, 56th Cong., 1st sess.; Sen. Rep. 1914, 56th Cong., 2d sess.; cf. *United States v. Praeger*, 149 Fed. 474 (W.D. Tex.). And it has remained a civil offense ever since. AW 23 of 1916 through 1948; Art. 47, UCMJ.

(b) The power given a court-martial to punish as for contempt anyone who disturbs its proceedings has however been continued. AW 12 of 1786; AW 76 of 1806; AW 86 of 1874; AW 32 of 1916 through 1948; Art. 48, UCMJ. But that power is to be sharply differentiated from the jurisdiction now asserted. As Winthrop said (*461-462), "The enforcing of the [contempt] Article in the instance of a civil person is not an exercise of military jurisdiction over him. He is not subjected to trial and punishment for a military offence, but to the legal penalties of a defiance of the authority of the United States offered to its legally constituted representative." For, after all, a court-martial is a court of the United States. *Gratton v. United States*, 206 U.S. 333.

(c) Finally, we suggest that, before it is sought to generalize regarding the allegedly "broad view which the Continental Congress had of the reach of the court-martial power" (Pet. Br., No. 21, p. 37, note 23), the Continental Congress' refusal to adopt in 1787 the proposal to make civilians in the Northwest Territory even temporarily amenable to military jurisdiction (see the *Singleton* brief in No. 22, at pp. 90-94), had better be, as in the cited reference it has not been, taken into account.

6. *It is necessary to distinguish between persons with civilian status and persons who, although having military status, bear apparently civilian titles.*

Under this heading we deal with two sources of confusion.

(a) There is cited (Pet. Br., No. 21, p. 48), an Act of 1790 that made the existing Articles of War applicable to "commissioned officers, non-commissioned officers, privates, and *musicians*," and the word "musicians" is there italicized as if to indicate that such persons were civilians!

Nothing could be farther from the truth. The fact is that, down through World War I, many, many enlisted men were designated in the statute book by the name of their occupational specialty. The musicians of 1790 were just as much enlisted men as were the privates.

Musicians are similarly met with in the Act of Mar. 3, 1791, c. 28, 1 Stat. 222, as well as in that of Mar. 5, 1792, c. 9, 1 Stat. 241; the latter statute also names farriers, saddlers, and "artificers included as privates."

The Militia Law of May 8, 1792, c. 33, 1 Stat. 271, includes drummers, fifers or buglers, farriers, and trumpeters.

In the Act of May 30, 1796, c. 39, 1 Stat. 483, there are provisions for farriers, saddlers, trumpeters, musicians and artificers. Sappers, miners, musicians and artificers "to serve as privates" are met with in the Act of April 27, 1798, c. 33, 1 Stat. 552. Blacksmiths appear in addition in the Act of Mar. 3, 1799, c. 48, 1 Stat. 749.

Similar provisions continue in our military legislation through the National Defense Act of June 3, 1916, c. 134.

39 Stat. 166; here are listed alphabetically the essentially civilian titles there applied to enlisted men of full military status (§§ 11, 17-20): bugler, cargador, casemate electrician, chief mechanic, chief planter, cook, coxwain, engineer, fireman, horseshoer, master electrician, master engineer, master gunner, mechanic, musician, packmaster, plotter, saddler, wagoner.

In short, the musicians in the army of 1790 were not civilians in any sense.

(b) It is also urged, primarily on the basis of secondary works, that the artillerymen of the Continental and early United States Army were civilians (Pet. Br., No. 21, pp. 37-39).

In fact, American artillerymen then as now were soldiers.

(i) In a General Order of Sept. 2, 1777 (9 *Writings of Washington* 167), Sergeant Dickinson and Corporal Adair of the Artillery were "sentenced to be reduced to a matross." In that context, very plainly, matross was a rank, because when non-commissioned officers are punished by being eliminated from the service, they are dishonorably discharged or, in late XVIII Century usage, dismissed. The foregoing is entirely consistent with the definition of "matross" in the *Oxford Universal Dictionary* as "A soldier next in rank below the gunner in a train of artillery, who acted as a kind of assistant or mate."

(ii) The earliest American statutes similarly list artillerymen as soldiers, and not as civilians. The Militia Act of May 8, 1792, c. 33, 1 Stat. 271, lists gunners, bombardiers and matrosses as enlisted men of artillery. The Act of May 9, 1794, c. 24, 1 Stat. 366, which established the Corps of Artillerists and Engineers, provided for "artificers to serve as privates." The Act of April 27, 1798, c. 33, 1 Stat. 552, authorizing an additional regiment of artillerists and

engineer., speaks of "sappers, miners, musicians and artificers to serve as privates." No later Act for organizing the military forces, and there are many, even faintly suggests that artillerymen are civilians.

(iii) Other contemporary records establish the military character of the American artillery. Thus, on August 18, 1792, General Wayne directed that "Captain Moses Parker will take charge and command of the artillery-armourers and artillery artificers." Wayne Orderly Book, MS., Hist. Soc. Pa., Phila.¹

On November 8, 1792, duties are ordered for "A Detachment of Artificers from the Legion consisting of 60 non Commissioned Officers and Privates." 34 Mich. Pion. & Hist. Coll. 400. And on Sept. 28, 1794, General Wayne disapproved a sentence of 50 lashes "passed upon a warrant officer," viz., the Master Armourer. *Id.* 556.

See also, with reference to armourers, pp. 42 and 43 below.

(iv) One of the earliest entries in 1 *Orderly Book of the Corps of Artillerists and Engineers* (MS., U.S.M.A.), which begins with May 7, 1795, lists the strength of the garrison as follows (p. 8): 1 captain, 4 lieutenants, 1 sergeant-major, 3 cadets, 4 sergeants, 6 corporals, 9 artificers, 4 musicians, and 67 matrosses. That is to say, a matross was a private of artillery.

It is thus plain that American artillerists were soldiers and not civilians.

(There may have been some artificers who were civilians, in addition to the artificers whose military status is plainly established; see the discussion below, at pp. 41-43.)

¹The transcription of this entry appearing at 34 Mich. Pion. & Hist. Coll. 363 is inaccurate.

7. *It is necessary to distinguish British precedents that cannot accurately serve as analogies.*

At this juncture we incorporate by reference the discussion in the Singleton brief in No. 22 at pp. 70-72, which explains why British Articles of War for the royal forces overseas are not precedents in the present situation, inasmuch as Parliament did not undertake to regulate the Army outside the realm until 1803-1813.

8. *It is necessary to distinguish naval precedents which frequently rest on a different basis from military ones.*

Naval precedents are not very illuminating in the present connection.

(a) Despite the doctrine that every ship is to be deemed, at least to some extent, an extension of the national soil (*Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 123), it is not the fact that (Pet. Br., No. 21, p. 54, n. 36) "Since 1800, murders committed outside the United States by persons connected with that branch of the armed services which was most frequently outside the United States—the Navy—have been subject to trial by court-martial." That jurisdiction extended only to persons belonging to a public vessel of the United States, as *Rosborough v. Rossell*, 150 F. 2d 809 (C.A. 1), unhappily taught; it did not extend to every enlisted man in the Navy. Not until 1945 was the jurisdiction widened to the extent asserted by the Government in the foregoing quotation. Act of Dec. 4, 1945, c. 554, 59 Stat. 595, amending AGN 6.

(b) Until very recently indeed the Navy had no jurisdiction even over accompanying civilians in time of war in the actual zone of war; see *Hammond v. Squier*, 51 F. Supp. 227 (W.D. Wash.). Thereafter the Navy was given such jurisdiction, limited however to time of "war or national emergency." Act of Mar. 22, 1943, c. 18, 57 Stat. 41; 34

U.S.C. [1946 ed.] §1201. Earlier, in 1937, the Judge Advocate General of the Navy ruled that the Commandant of the leased U.S. Navy Base at Guantanamo Bay in Cuba had no jurisdiction whatever to try by court-martial civilians living there. Court-Martial Order 11 of 1937, p. 18.

(c) The citation (Pet. Br., No. 21, p. 62) of the cases of the Navy's paymasters' clerks (*Ex parte Reed*, 100 U.S. 13; *Johnson v. Sayre*, 148 U.S. 109; *McGlensy v. Van Frankem*, 163 U.S. 694) is actually wide of the mark.

The Articles for the Government of the Navy there considered (R.S. §1624) contained no provision comparable to the contemporaneous Army camp-follower provision (AW 63 of 1874, in R.S. §1342), nor indeed any other provision whatever that purported to subject civilians to trial by court-martial.

This Court's holding, therefore, was, not that naval courts-martial could try civilians, but that, since a paymaster's clerk in the Navy had already been held to be an officer for some purposes (*United States v. Hendee*, 124 U.S. 309), he was (148 U.S. at 117) "a person in the naval service of the United States"—and as such subject to naval jurisdiction.

Inasmuch as it is not for a moment suggested that Guagliardo (of No. 21), or this petitioner, or Grisham (of No. 58) are in any sense "persons in the military service of the United States," it follows that the cases involving the former paymasters' clerks of the Navy are completely inapposite in the present connection.

(d) Finally (Pet. Br., No. 21, p. 54, note 36), it is sought to bolster the argument in support of the jurisdiction by referring to a popular history of the United States Coast Guard "for examples of public vessels manned by civilian seamen in 1800."

If the attempt there is, by inference from the foregoing, to suggest that the Coast Guard—known prior to 1915 as the U.S. Revenue Cutter Service—exercised court-martial jurisdiction over those civilian crews, then the suggestion is completely misleading. For the fact is that the Revenue Cutter Service, for well over a century, from 1790 when it was founded (§§62-64, Act of Aug. 4, 1790, c. 35, 1 Stat. 145, 175) until 1906 (Act of May 26, 1906, c. 2556, 34 Stat. 200), not only had no courts-martial of any kind, but was without any legal means of enforcing discipline on its ships. See Sen. Rep. 958 and H.R. Rep. 2749, both 59th Cong., 1st sess.

We say, therefore, that any blue-water precedents must be used with extreme care.

Having drawn attention to some basic distinctions that must be made in the evaluation of the historical materials, we now proceed to set forth all of the historical evidence bearing on the present issue that we have found.

B. The only known English ruling from the XVIII. Century held that there was no military jurisdiction over accompanying civilians in time of peace.

In the course of his famous judgment in *Mostyn v. Fabrigas*, 1 Cowp. 161 (1774), Lord Mansfield, C.J., said (pp. 175-176):

"I remember, early in my time, being counsel in an action brought by a carpenter in the train of Artillery, against Governor Sabine, who was Governor of Gibraltar, and who had barely confirmed the sentence of a court-martial, by which the plaintiff had been tried, and sentenced to be whipped. The Governor was very ably defended, but nobody ever thought that the action

would not lie; and it having been proved at the trial, that the tradesmen who followed the train, were not liable to martial law; the Court were of that opinion, and the jury accordingly found the defendant guilty of trespass, as having had a share in the sentence; and gave 500/ damages."

Now, very plainly, the foregoing is the recollection of a trial by a participant therein; but we submit that even the professional reminiscences of a Lord Mansfield are apt to portray far more accurately the law of his time in action than the forced inferences now sought to be drawn, nearly two centuries later, from the bare bones of the statute book (Pet. Br., No. 21, pp. 29-32). In any event, Lord Mansfield demolishes the suggestion (*id.*, p. 53) that courts-martial in Gibraltar had power to punish civilians for offenses otherwise cognizable in the civil courts.

Lord Mansfield's conclusions are moreover in accord with those set forth in Clode, *The Administration of Military and Martial Law* (2d ed. 1874) 94, 95 (quoted in the *Singleton* brief in No. 22), and show that the passage from Samuel, *Historical Account of the British Army and of the Law Military* that is quoted at Pet. Br., No. 21, pp. 31-32, plainly had reference to the wartime situation "in the field."

Reference is also made to the Act of 5 Geo. III, c. 33, likewise quoted in the *Singleton* brief, by the terms of which British military commanders in North America were directed to send civilian offenders in the wilderness to the nearest settled colony for trial. See pp. 72-74 of that brief.

The foregoing authorities establish that the assertion (Pet. Br., No. 21, p. 33) "that provision by the legislature for the trial by court-martial of persons 'in civil life'

was not repugnant to the English concept of liberty at the time of, and preceding, the American Revolution" has only the merit of hopefulness. The cited authorities show that the quoted assertion is simply not so.

C. The many military trials of civilians by the Continental Army during the Revolutionary War do not support the peacetime military jurisdiction now asserted.

We have listed in Appendix A the cases of 78 civilians of whose trials by court-martial we have found mention in Washington's General Orders ~~over~~ an eight year period, from 1775 to 1785. (We may note that the Government cited only 18.)

Part I of Appendix A lists the civilian employees so tried. Since every one of those trials took place in the Continental Army, in time of war, and "in the field," it is plain that those instances add nothing to what we have always conceded, viz., that civilians with the forces at such a time and place are subject to military law. Those examples do not, however, lend any support to the Government's attempt to erase the "in the field" limitation, in part by assertion (Pet. Br., No. 21, pp. 52-61), and in part by avoiding mention of the many official rulings which insisted on that limitation.

Part II of Appendix A lists the civilians tried by Continental Army courts martial who were not employees of that Army. (We cite 35, as against a mere two listed by the Government.)

Some of those in the second group were spies, who as offenders against the law of war have traditionally been triable by the military regardless of their status otherwise. See *Ex parte Quirin*, 317 U.S. 1. The balance were inhabi-

taints, tried not under the Articles of War, but pursuant to a resolve of Congress that denounced aiding the enemy. In a sense, this too was a jurisdiction to punish breaches of the laws of war.

That analysis does not involve reading into an Eighteenth Century practice concepts not fully developed until the Twentieth; Washington himself pointed out the distinction in a contemporary letter written on Feb. 14, 1778 (10 *Writings of Washington* 458-459):

"There are, however, some mistakes in the present proceedings, which it will be necessary to rectify in the next. Joseph Rhoad and Windle Myer, being inhabitants, are not triable on the Articles of War, but must be tried on a special resolution of Congress passed the 8th of October last and extended by another of December 29th, which are inclosed for the Government of the Court."

For the resolutions in question, see 9 J. Cont. Cong. 784 and 1068.

Similarly, Washington wrote Gen. Smallwood on May 19, 1778 (11 *Writings of Washington* 420):

"In those cases, where it is a crime, if the criminal is an inhabitant, we have no law, subjecting him to the jurisdiction of a court martial, but he must be referred to the civil power, to be tried for treason. There is a resolve of Congress, empowering Courts Martial to take cognizance of inhabitants who have any communication of Trade or intelligence with the enemy, or who serve them in the capacity of guides or pilots; but the operation of this law is limited to persons taken within thirty miles of Head Quarters; which prevents its application to the present case."

Otherwise stated, this was an "in the field" jurisdiction even as to non-accompanying civilians. For, as Washington had written Governor Livingston of New Jersey on April 15, 1778 (11 *id.* 262),

"I am not fully satisfied of the legality of trying an inhabitant of any State by Military Law, where the Civil authority of that State has made provision for the punishment of persons taking Arms with the Enemy."

And, on April 9, 1779, Washington ordered a spy to be delivered up to civil authority. 14 *id.* 357.

But, while Washington was thus sensitive to the boundary between the civil and the military jurisdiction, some at least of the trials listed in Appendix A would plainly not pass muster today; see Nos. 9, 20, and 39, where the civilian official, being described as "late" Commissary, etc., appears to have left the service. Cf. *Toth v. Quarles*, 350 U.S. 11.²

Nor is it clear how and to what extent all of the trials of inhabitants noted would fare under the tests for war-time military jurisdiction of, respectively, *Ex parte Milligan*, 4 Wall. 2; *Ex parte Quirin*, 317 U.S. 1; and *Duncan v. Kahanamoku*, 327 U.S. 304.

But it is not necessary to pursue that speculation. It is sufficient that none of the trials of civilians by Continental court-martial during the Revolutionary War even faintly support the jurisdiction now asserted.

² In 1779 (15 *Writings of Washington* 108-109) the trial of an officer who had resigned was ordered. It does not appear whether the resignation had merely been tendered or whether it had actually been accepted; the context suggests the former.

D. *Military trials of civilians in the 1790s, at a time when there was endemic conflict between the military and civilian authorities, reflect primarily illegal assertions of military power and do not establish any authoritatively settled practice, such as the Government now urges, of exercising military jurisdiction only over civilians actually with the army in areas where there is no civil jurisdiction.**

In Appendix B, we list 40 instances of civilians or possible civilians tried by court-martial or punished by the military, between January 1793 and November 1798, a number of which are still recorded only in manuscript.

As will be pointed out immediately below, these trials can be classified in four groups, one plainly legal; two, equally plainly illegal; and ~~only a fourth group that falls even~~ arguably within the limits now advanced by the Government, viz., military trials of civilians accompanying the army in peacetime in an area where there is no civil jurisdiction. .

Yet none of these trials appear to have been approved by higher authority, whether civil or military, and therefore, particularly since this period witnessed continuous friction between the civil authorities and the army over the scope of the latter's authority, none of these instances can be regarded as covering with a mantle of constitutional legitimacy the precisely defined military jurisdiction now sought to be sustained.

1. *The trials from 1793 to 1798 divided into categories.*

Four categories immediately suggest themselves:

(a) The first is the "in the field" jurisdiction over civilians, the trial by court-martial of a civilian with the army

* It is requested that Appendix *infra*, pp. 128 *et seq.*, be read before proceeding with this section.

at a time and in a place where military operations are being carried on. This jurisdiction is plainly legal; see Art. 2(10), UCMJ, and particularly the discussion at pp. 28-33 of the *Singleton* brief in No. 22.

(b) The second is military jurisdiction over civilians accompanying the forces in time of peace but at a place distant from any civil courts. This is debatable ground in the present cases; the Government contends that it is legal, we show that it was consistently condemned in numerous official rulings that the Government ignores.

(c) The third is military jurisdiction over civilians accompanying the forces in time of peace but in places where the civil courts are functioning. That jurisdiction is condemned by the Sixth Amendment, and we do not understand the Government to support its legality anywhere in the United States.

(d) The fourth category is military jurisdiction over civilians not shown to be functionally connected with the Army in any way, but simply in the vicinity. Such trials are of course palpably illegal. For this was the kind of military jurisdiction over ordinary civilian offenders that the British Parliament in 1765 and thereafter had refused to exercise, and that the Continental Congress in 1787 had refused to extend, even temporarily, over this precise area. See the details in the *Singleton* brief in No. 22 at pp. 72-74 and 90-94.

The 40 instances noted in Appendix B may be divided as follows (cases are numbered as there stated).

(a) *In the field*. In this category may be placed the two trials of sutlers at Green Ville in July 1794 (Nos. 2 and 5), at a time when the campaign that culminated in the victory at Fallen Timbers was about to start. See Jacobs, *The Beginning of the U. S. Army, 1785-1812* (1947) 168-171.

Possibly this would include also the two trials of traders unconnected with the army, Nos. 3 and 4.

(b) *Peacetime, distant from civil jurisdiction.* Most of the rest of the trials of accompanying civilians while the Army was under Wayne's command might be included here; see Nos. 6-18, 23-25, 29. However, if it be considered that the state of potential hostilities did not terminate until the signing of the Greenville treaty with the Indians on August 3, 1795, then all but No. 29 must be regarded as having taken place "in the field."

Also, since Greenville was within the boundaries of the organized Northwest Territory, it might be urged that there was an existing civil jurisdiction; one would have to determine the extent to which Greenville was then a settled community.

It should be noted that the civilian status of at least nine of the foregoing (Nos. 7-15) cannot be deemed to have been established beyond question; see *infra*, pp. 41-43.

In any event, seven other trials (and one instance of punishment without trial) involved civilians not alleged to have been connected with the army (Nos. 19-22, 26²-27, 30).

(c) *Peacetime, within civil jurisdiction.* Seven of these cases are listed: No. 1, at Legionville, within the Commonwealth of Pennsylvania; Nos. 30A and 31 at West Point, N.Y.; Nos. 32, 33, and 37 at Detroit; and No. 38, at Pittsburgh.

(i) Legionville was a few miles northwest of Pittsburgh; it is now in Harmony Township, Beaver County, Pa.; see map in Wildes, *Anthony Wayne* (1941) 361. Very plainly, it was in a settled area, and indeed Gen. Wayne had, in Pittsburgh and elsewhere, sharp conflicts with the civil authorities. Wildes, 378-379.

(ii) West Point was then only within Orange County, N.Y., and had been purchased in 1790 pursuant to authority granted by the Act of July 5, 1790, c. 26, 1 Stat. 129. Not until March 2, 1826, did New York cede exclusive jurisdiction to the United States. N.Y. Laws of 1826, c. 64, p. 46; see *United States v. Knapp*, Fed. Case No. 15,538 (S.D. N.Y.). New York's writ ran there; see *In the matter of Carleton*, 7 Cow. 741 (N.Y. 1827). (For the present jurisdictional posture, cf. *People v. Hillman*, 246 N.Y. 467, 159 N.E. 400.)

(iii) Detroit in 1797 had a sheriff and a full complement of civil magistrates. See 2 Quaife, ed., *The John Astin Papers* (1931) 112-114. And Gen. Wilkinson was sued and had difficulties because he did not observe the boundary between civil and military authority. 2 *id.* 165, note 66.

(iv) *A fortiori*, Pittsburgh in 1798 (No. 38) had a settled system of civil courts.

(d) *Peacetime, over civilians unconnected with the Army*. At least 15 of the civilians tried by court-martial or otherwise punished by the military in the 1790s are not shown to have been connected with the Army in any degree. This group comprises the following: Under Gen. Wayne, two traders (Nos. 3 and 4), and seven others (Nos. 19-22, 26-28), among whom was a former soldier (No. 19). It includes Polly Toomy, flogged without trial at West Point in 1795 (No. 30A) and "Betts the Whiskey Smuggler" drummed out of camp by Gen. Wilkinson's order in 1796 (No. 30). And it includes the following, tried by court-martial *tempore* Wilkinson, viz., a merchant and two civilians at Detroit (Nos. 34-36), and the Spaniard in Mississippi Territory in 1798 (No. 39).

We believe it is not possible to establish the legitimacy of this last group of trials on any basis.

2. *The foregoing trials establish, not a settled legal practice, but simply show the nature of and reason for the conflict between military officers and civil officials that characterized the American frontier in the 1790s.*

The trials here in question, far from reflecting a settled jurisdiction, affirm rather the timelessness of this Court's observation in *Inland Waterways Corp. v. Young*, 309 U.S. 517, 524, that "illegitimacy cannot attain legitimacy through practice."

Leonard White in his administrative history of the first three presidential terms has shown how endemic conflict between civil and military officials dogged the early years of territorial government. See "Government in the Wilderness" in *The Federalists* (1948) 366-386. Many examples document that conflict as it touched military jurisdiction over civilians.

(a) As early as August 15, 1791, Judge Symmes of the Northwest Territory was complaining that Governor St. Clair was "putting part of the town of Cincinnati under military government. Nor do the people find their subordination to martial law a very pleasant situation. . . . There are, indeed, many other acts of a despotic complexion, such as some of the officers . . . while General Harmer commanded, beating and imprisoning citizens at their pleasure." Bond, ed., *The Correspondence of John Cleres Symmes* (1929) 148-149.

Another complaint from the same source is dated January 25, 1792 (*id.* 161):

"The superiority which the Governor affected to give the military over citizens, is maintained with ridiculous importance by some of the officers. I will give you one instance: Capt. Armstrong, commanding at Fort

Hamilton, ordered out some settlers and] threatens to dislodge them with a party of soldiers if he is not obeyed. The citizens have applied to me for advice, and I have directed them to pay no regard to his menaces, yet I very much fear he will put his threats in execution, for I well know his imperious disposition. This same Armstrong, soon after the Governor had ordered Knowles Shaw's house burned, and himself and family banished, met with Mr. Martin, the deputy sheriff, with whom, a little before, he had some dispute touching the superiority of the civil or military authority. Armstrong now deridingly takes the sheriff by the sleeve, saying: "What think you of the civil authority now?" "

Judge Symmes shortly received assurances that such performances would cease. Secretary of State Jefferson wrote him on June 22, 1792 to say (2 Terr. Pap. of the U.S. 401),

"[The President] has permitted me to inform you that explicit orders are given to the Military in the North western territory to consider themselves as subordinate to the civil power on every occasion where the civil has legal authority to interfere, and this I believe may be counted on for observance."

(b) In 1792, Ensign W. H. Harrison (later the 9th President) was sued by two Army artificers for stripes inflicted by his direction under Gen. Wilkinson's order. Judge Symmes was of opinion that "the artificers of an army are subject to martial law," but that the question "an artificer, or no artificer" was for the civil courts to determine. 2 Terr. Pap. of the U.S. 400, 402.

As nearly as can be determined at this distance, there were military artificers as well as civilian artificers at this

period, so that it is not at all clear that the individuals who sued Ensign Harrison were civilians.

(i) *Military status.* In Sec. 7 of the Act of March 5, 1792, c. 9, 1 Stat. 241, 242, there is a reference to "artificers included as privates." Similarly, in Sec. 3 of the Act of May 9, 1794, c. 24, 1 Stat. 366, provision is made for "ten artificers to serve as privates." In later military legislation, through at least 1802, artificers constantly appear as military individuals. See also the references to artificers in the *Orderly Books* of General Wayne and of the Corps of Artillerists and Engineers, quoted *supra*, p. 28.

Similarly, with respect to a category closely allied to the artificer, the Wayne *Orderly Book* for March 27, 1795 (34 Mich. Pion. & Hist. Coll. 593) records the following trial, announced from Head Quarters Green Ville:

"At a General Court Martial whereof Major Buell is President, William Crocker, an Armourer in the Service of the United States, and James Scott a Fifer in the 4th Sub Legion, were tried upon the charges respectively exhibited against them, found Guilty, and ordered to receive One hundred lashes each, but recommended by the Court to Mercy—

"The Commander in Chief Pardons them Accordingly, and Orders them to be immediately liberated and to join the companies to which they belong—"

Here, it would seem, the armourer was a soldier. Compare the entry quoted *supra*, p. 28, where the Master Armourer is referred to as a warrant officer.

(ii) *Civilian status.* The early entry in 1 *Orderly Book of the Corps of Artillerists and Engineers* 8, quoted *supra*, p. 28, lists artificers as military members of the garrison. A later order in the same year (1 *id.* 151) speaks of "No

Artificer not belonging to the Regiment * * *." Such persons, it is fair to assume, were civilians.

(iii) *Questionable status.* In the 1776-1786 Articles of War in force during the period in question, Art. 23 of Sec. XIII was the provision regarding accompanying civilians, while Art. 5 of Sec. XVIII was the general article. The latter referred only to "officers and soldiers," while the civilian provision was by its terms applicable to certain classes of civilians "though no enlisted soldier."

If the court-martial order, therefore, mentions Art. 23 of Sec. XIII, with or without a further mention of Art. 5, Sec. XVIII, it is fair to assume that the accused is "no enlisted soldier," unless of course his description, as, e.g., a sutler, plainly shows him to be a civilian. Contrariwise, failure to refer to Art. 23 of Sec. XIII may be taken in equivocal cases to reflect a military rather than a civilian status on the part of the person on trial.

On that footing the individuals tried in cases 7-15 inclusive may well not have been civilians, a view confirmed by the fact that William Crocker, Armourer, No. 10, appears to be the same individual who in the entry for March 27, 1795, quoted above, p. 42, seemed clearly to be a soldier rather than a civilian.

The results of trial in all nine cases, five of the accused being designated as armourers, the other four as artificers, were announced in the same order of Jan. 31, 1795 (34 Mich. Pion. & Hist. Coll. 583-584).

The question of these nine individuals' civilian status can, therefore, only be answered with the Scotch verdict, Not proven.

³ Later AW 99 of 1806; AW 62 of 1874; AW 96 of 1916 through 1948; Art. 134, UCMJ.

(c) Meanwhile, at Pittsburgh, where he had arrived by July 1792, Gen. Wayne was becoming embroiled with civil authorities also. Wildes, *Anthony Wayne*, 378-379. By December, he had moved the troops to Legionville, still within the Commonwealth, and there, on December 9, 1792, he issued the following order (*Wayne Orderly Book*, MS. Hist. Soc. Pa., Phila.):

"It having been represented to the Commander in Chief, that the market has been forestalled; and high and exorbitant prices Demanded & given for a variety of Articles, far beyond any price heretofore known in this Country from the thoughtless conduct of Individuals. * * * it becomes necessary that there should be an Officer of Police to Superintend & regulate the Market; and whilst he Allows a generous price for the produce brought to this place (except whiskey: which is hereby Prohibited from being Sold, bartered or furnished the Soldiery either directly or indirectly by Merchants traders or Others) he will at the Same time protect the inhabitants from injury and insult; and Guard against exorbitancy and forestallment.—

"Captain Porter will perform this Duty and make the necessary Arrangements & Regulations. * * *

It goes without saying that, when a military commander has such a distortedly inflated view of his powers over the civilian economy in a State of the Union in time of peace, one cannot take too seriously his jurisdictional practices in respect of trying civilians by court-martial.

(d) At Detroit in July 1797, Gen. Wilkinson issued an order aimed at civilians who sold liquor to soldiers and who persuaded them to desert; *Wilkinson Order Book* (MS.,

* *Le. Wayne*, who normally signed himself "Major General and Commander in Chief of the Legion of the United States."

Nat. Archives) 48, quoted in full below; see page 114, note 3.

Now, very plainly, Wilkinson had no power to direct civilians in a community where magistrates and a sheriff were functioning to do anything; his authority was limited to his own troops. Moreover, enticing a soldier to desert had been made a civil offense by Congress in the preceding year, see Sec. 15 of the Act of May 30, 1796; c. 39, 1 Stat. 483, 485, and punishable with a maximum penalty of a \$300 fine *or* one year's imprisonment. Yet Wilkinson approved, for precisely the same offense, a particularly vicious sentence passed on a civilian inhabitant by a court-martial, that condemned him, among other indignities, to shaving of the head and eyebrows and fifty lashes with a wired cat-of-nine-tails (No. 35).

Obviously, then, his three trials of citizens at Detroit (Nos. 34-36) were palpably illegal on any basis; while those of the sutlers (Nos. 32, 37) and of the woman of the camp (No. 33), there being civil authority present, were likewise unlawful although perhaps less strikingly so.

Notice has already been taken of the conflict evoked by this assertion of power, *supra*, p. 39; and in 1799 the commanding officer at Detroit had again to be reminded by higher authority of "the error * * * in proclaiming military law, and threatening the inhabitants with punishment by court-martial." 3 Terr. Pap. of the U.S. 20-21.

Wilkinson's trial of a follower at Pittsburgh in 1798 (No. 38) stands on no better footing.

His last recorded trial of a civilian, a Spanish subject, took place in November 1798 at Loftus's Heights, Mississippi Territory (No. 39), now Fort Adams, Wilkinson Co., Miss., in the southwestern part of that state.

By that time the Mississippi Territory had been organized (Act of April 7, 1798, c. 28, 1 Stat. 549), and Winthrop Sargent had been commissioned Governor (5 Terr. Pap. of the U.S. 28-29) and had arrived in Natchez (*id.* 52, note 5). It may well be that no courts were yet functioning. But there is reason to believe that the accused was tried and his punishment remitted primarily that Wilkinson might show the remission to the Spanish Governor at New Orleans and thus curry favor with his paymaster. Jacobs, *Tarnished Warrior: Major-General James Wilkinson* (1938) 183 (transmission of order to Gayoso), 271-273 (proof in Spanish Archives of payments to Wilkinson).

(c) Little more can be said for the trial of the sutler at West Point in 1795 (No. 31).

Major Tousard, Commandant of the Garrison, the same who two months earlier had ordered Polly Toomy flogged without trial (No. 30A), on Sept. 26, 1795 issued a Standing Order (1 *Orderly-Book of the Corps of Artillerists and Engineers* (MS, U.S.M.A.) 151):

"To all whom it may Concern

"Be it know, that defense is expressly made to sell any Liquor to the Soldiers composing this Garrison * * *"

This was followed by the text of Sec. XIII, Art. 23, of the 1776 Articles of War, then still in force.

It can hardly be supposed that an officer who after nearly twenty years had been unable to absorb idiomatic English would be aware of the Anglo-American tradition of civilian supremacy or of the constitutional distinctions flowing from the circumstance that his post was within a State of the Union at a time and place of piping peace.

Major John Joseph Ulrich Rivardi, who approved the proceedings, was likewise a Frenchman by birth, whose first commission in

3. *The circumstances of these trials are not such as to establish their legitimacy.*

Wayne had been a surveyor and a tanner before he became a soldier (19 Diet. Am. Biog. 563). Wilkinson a doctor (Jacobs, *Tarnished Warrior* 3-7). Tousard had been a soldier when he came to America in 1777 as a volunteer (1 Heitman 966), and St. Clair had written Washington in 1789 (2 Terr. Pap. of the U.S. 204, 207). "The present Governor pretends not to a knowledge of the Law—" The sum total of these trials, therefore, does not add up to a consensus of lawyers' opinion as to the constitutional boundaries of military power.

Even contemporaries questioned the legality of some of the proceedings. Wilkinson himself wrote the Secretary of War on March 14, 1797 in these terms (*Memoirs of General Wilkinson*, 1810 ed., App. to vol. I, 173-174):

"I consider it my duty, in this place, to urge the appointment of a judge advocate, and to recommend lieutenant Smith to the office, as the individual of the army, best qualified for the station. After the ignorance, misrule and lawless proceedings, which I have witnessed in our military tribunals, I should be criminal were I silent on this occasion. In a community, where men are so frequently put upon trial for life and honor, and where we very often find their judges young men, strangers to every rule of practice in judiciary proceedings, and profoundly ignorant in all things; surely, every possible precaution should be

the United States Army dated from Feb. 26, 1795—little more than eight months previously. 1 Heitman 833.

* This is a wholly different work from the 1816 edition published as *Memoirs of My Own Times*. The earlier work was never completed, and the volumes actually published are in the Rare Book Division of the Library of Congress.

interposed, to promote the lights of information and to preclude error; for, to the reproach of humanity, our military records bear testimony to several unjust sentences, and to one illegal execution of a private soldier. * * *

The appointment of a judge advocate had been authorized by Sec. 2 of the Act of March 3, 1797, c. 16, 1 Stat. 597, but Campbell Smith, by then a Captain, appears not to have been appointed to the office by the President until 1801. *Wilkinson Order Book* 321 (Apr. 9, 1801); 1 Heitman, 894-895 (appointment as judge advocate, Apr. 1, 1801).

Yet—and here is a curious point—Lt. Campbell Smith's appointment as "Judge Martial and Advocate General to the Legion of the United States" is duly noted in the Wayne Orderly Book for July 16, 1794 (34 Mich. Pion. & Hist. Coll. 529), and he was able to persuade the Congress to allow him extra pay on the footing of the earlier appointment. 1 Am. St. Pap. Mil. Aff. 144-146; Act of March 29, 1800, c. 17, 6 Stat. 40.

It is true that some of the earliest court-martial proceedings still extant reflect patent irregularities. Thus, although AW. 6 of 1786 clearly made provision for a judge

See also the orders of Sept. 8 and 23, 1792, at Pittsburgh, appointing Lieut. Staats Morris "Deputy Judge Advocate General to the Legion of the United States," and directing that he "will always officiate as Judge Advocate at General Courts Martial." 34 Mich. Pion. & Hist. Coll. 379 and 385.

All War Department papers prior to 1801 were destroyed in a fire on the night of Nov. 8, 1800. 1 Am. St. Pap. Misc. 232, 603. Earlier court-martial orders appear in the order books of Gens. Wayne and Wilkinson and of the Corps of Artillerists, etc., at West Point. The only complete proceedings that record the testimony prior to 1808 of which we are aware are in the Wayne MSS., Hist. Soc. Phila. The series in the National Archives (*Proceedings of Court-Martial, War Office*) contain nothing earlier than 1808.

advocate, the West-Point *Orderly Books of the Corps of Artillerists and Engineers* contain proceedings in which there was no judge advocate but only a "Recorder" (1 *id.* 93) or a "Judge Recorder" (2 *id.* 112), or where a cadet was "Acting Judge Advocate" (4 *id.*, Nov. 10, 1798).

And, whether or not Campbell Smith was Judge Martial to the Legion in the sense of being a legal adviser to its Commander, his ability to influence the imperious temper of Anthony Wayne may well be doubted. That officer's court-martial orders reflect, even by the standards of that day, a broad streak of consistent brutality.

Soldiers were frequently sentenced to be branded on the forehead (34 Mich. Pion. & Hist. Coll. 371, 381, 484), a practice at which the Secretary of War frowned and which the President questioned. See letters Wayne to Knox, Aug. 10 and Sept. 7, 1792, in 1 *Campaign Into the Wilderness: The Wayne-Knox-Pickering-McHenry Correspondence* (Knopf ed. 1955) 52, 81; Knox to Wayne, Sept. 14, 1792, 1 *id.* at 90; Washington to Sec. War., Aug. 26, 1792, 32 *Writings of Washington* 134, 135.

Some of Wayne's sentiments simply mirrored the era. Thus, in confirming a death sentence for mutiny—later reprieved—he wrote on August 3, 1792, "A soldier who lifts his arm against his officer ought not to be permitted to live." 34 Mich. Pion. & Hist. Coll. 356. But on other occasions his confirmations in capital cases appear to exhibit an almost personal satisfaction:

"One of the most savage of such sentences was passed on a soldier convicted of stealing from the tent of Wayne's aide-de-camp: "to walk the Gantlett, through the Legion of the United States (slow step) Naked.—to have his head and eye brows shaved, to be branded on his forehead, and in the palms of both hands with the letter T and to be drummed out of Camp with a halter around his neck and dismissed the Service." *Wayne Orderly Book*, Head Quarters Legion Ville, Feb. 17, 1793 (MS., Hist. Soc. Pa., Phila.).

"The Reverend Doctor Jones will attend and prepare these unhappy Men, for the great change they are shortly to experience." Nov. 27, 1794, 34 *id.* 571.

"The Reverend Doctor Jones, will attend at the Provost, and prepare the Minds of these unfortunate Men, * * * for the awful Moment of their exit from this transitory World." July 2, 1795, 34 *id.* 624 (later pardoned on Aug. 29, *id.* 640).

A similar harshness had attended Gen. Wayne's suppression of the mutiny in the Pennsylvania Line in 1783. Wildes, *Anthony Wayne*, 242-245.¹⁰

4. *None of the foregoing trials were ever approved by higher civil authority, but were contrary to policies formulated by civil authority.*

There is no indication whatever that any of the military trials of civilians discussed above were ever approved by, much less submitted to, higher civil authority. If they had been, then we would at least be vouchsafed an authoritative contemporaneous interpretation of military law.

¹⁰ In Wildes, 378, it is said, "When Ensign William T. Payne was caught weeping at the sight of a deserter's being executed [Sgt. Trotter, per order of Nov. 11, 1792, at Pittsburgh], the boy was charged with drunkenness and was forced out of the army." But the actual proceedings (49 Wayne MSS., Nos. 51-54, Hist. Soc. Pa.) hardly support this stricture. The accused in his defense said, "my mind affected with melancholy reflection on human fatality (although at the same time I approved both the sentence and the execution) this might account for my shedding tears without being supposed intoxicated." There was considerable testimony that Payne was drunk. And certainly no degree of melancholy would account for his falling over the late deserter's corpse, a fact that was established by the evidence. The accusation therefore cannot be regarded as a concocted subterfuge.

The court sentenced Payne to dismissal, with a recommendation for clemency "so far as to receive his resignation without publishing his disgrace"; and Gen. Wayne permitted him to resign accordingly, by order of Nov. 17, 1792. 34 Mich. Pion. & Hist. Coll. 405.

such as exists in the approval by President Madison of Gen. William Hull's trial by court-martial in 1814 where the accused was denied the assistance of counsel despite his invocation of the Sixth Amendment. See references collected in 72 Harv. L. Rev. 29-31, and commentary, *id.* 42-49.

Certainly Washington's letter to the Secretary of War in September 1792, referring to neglects on the road between Philadelphia and Pittsburgh within the Commonwealth of Pennsylvania, cannot be construed as a direction to try the offenders by court-martial.¹¹

The fact is that, in the area now being considered, every expression from higher authority points to a disapproval of the exercises of military jurisdiction that have just been reviewed at such length. Here are two letters from President Washington, written at the time of the Whiskey Rebellion: the first is to Governor Lee of Virginia, then in command of the militia, dated Oct. 20, 1794. Washington wrote (34 *Writings* 6):

"There is but one point on which I think it proper to add a special recommendation. It is this, that every officer and soldier will constantly bear in mind that he comes to support the laws and that it would be peculiarly unbecoming in him to be in any way the infractor of them; that the essential principles of a free government confine the provinces of the Military to these two objects: 1st: to combat and subdue all who may be found in arms in opposition to the National will and authority; 2dly to aid and support the civil Magistrate in bringing offenders to justice.

¹¹ "The conduct of the Waggoners, in dropping the public stores with the transportation of which they are charged, along the Road to Pittsburgh, ought to undergo the strictest scrutiny; and in cases of culpability, to meet with severe punishment by way of example to others." 32 *Writings of Washington* 139.

The dispensation of this justice belongs to the civil Magistrate and let it ever be our pride and our glory to leave the sacred deposit there unviolated . . ."

The President restated the same views to Gen. Morgan on March 27, 1795 (34 *Writings* 159-160):

"Still it may be proper constantly and strongly to impress upon the Army that they are mere agents of Civil power: that out of Camp, they have no other authority, than other citizens [,] that offences against the laws are to be examined, not by a military officer, but by a Magistrate; that they are not exempt from arrests and indictments for violations of the law; that officers ought to be careful, not to give orders, which may lead the agents into infractions of the law; that no compulsion be used towards the inhabitants in the traffic, carried on between them and by the army: that disputes be avoided, as much as possible, and be adjusted as quickly as may be, without urging them to an extreme: and that the whole country is not to be considered as within the limits of the camp."

That is to say, while the armed force of the Nation was actually arrayed against the insurrectionists in Western Pennsylvania, Washington was denouncing the very excesses that Wayne had committed in substantially the same area a few years earlier, at a time when all was peaceful.

It should also be noted that there is no evidence whatever that the trials now under consideration ever came to the attention of the Congress.

Indeed, there is ample evidence on the statute book that Congress during this period was somewhat less than eager to face up to the problem of conforming the Continental Articles of War to the new Constitution.

General Knox, last Secretary at War under the Confederation and first Secretary of War thereafter, immediately recognized in August 1789 "that the change in the Government of the United States will require that the articles of war be revised and adapted to the constitution" (1 Am. St. Pap. Mil. Aff. 6). Washington transmitted his recommendations for a small peacetime Army to the Senate, remarking "that the establishment thereof should in all respects, be conformed by law, to the Constitution of the United States" (30 *Writings of Washington* 376). But Congress for many years was quite unwilling to undertake the necessary labor of revising, adapting, and conforming.

On no less than three occasions in the 1790's, Congress simply reenacted the Continental Articles of War with a generalized qualification, "as far as the same may be applicable to the constitution of the United States" (Sec. 13 of the Act of Apr. 30, 1790, c. 10, 1 Stat. 119, 121; Sec. 14 of the Act of Mar. 3, 1795, c. 44, 1 Stat. 430, 432; Sec. 20 of the Act of May 30, 1796, c. 39, 1 Stat. 483, 486). On a fourth occasion, the Continental Articles for the Government of the Navy were similarly reenacted (Sec. 8 of the Act of July 1, 1797, c. 7, 1 Stat. 523, 525). Here was a blanket proviso, telling the reader everything—and nothing—except, inferentially, that Congress was more than prepared to postpone to a future day the expression of constitutional opinions in this area.

And it is a fact that the revision of the Articles of War that Secretary Knox had indicated to be necessary in 1789 was not in fact effectuated until 1806, and then only after many delays. See, for the legislative history, 72 Harv. L. Rev. at 15-22.

Accordingly, the legislative materials fail to show acquiescence in, much less ratification of, the military trials of civilians that we show took place in the 1790's.

5. *The foregoing trials are not a safe guide to constitutional interpretation, and therefore do not support the military jurisdiction now asserted:*

Even at the risk of repetition, we deem it proper to point out that of the foregoing trials, those at West Point, at Pittsburgh, and at Detroit were palpably, indeed flagrantly, illegal, since the civil courts were open and functioning.

Some of the wilderness trials were very obviously in the field; the others may present borderline cases. But it must always be borne in mind that Major General Anthony Wayne, doughty Indian fighter that he was, is not to be regarded as a constitutionalist.

The Republic must ever be grateful to him for (literally) whipping the Legion into such form that it could win the smashing triumph over the Indians at Fallen Timbers that made the Old North West actually and not merely nominally American.

There is no occasion now to consider whether or not great fighters are also great men. It is sufficient here merely to observe that it would be badly misreading the troubled time of the 1790's to suggest that Anthony Wayne's actions can furnish guidance in settling the boundaries of military power. He did so much that was obviously illegal that the simple fact of his having acted as he did—the mere historical precedent—cannot possibly serve as a constitutional precedent, least of all since what he did ran counter to the views expressed by the President in the same area, and was never shown to have been brought to the attention of, much less approved by, the Congress.

Moreover, as we point out in Appendix D, pp. 128 *et seq.*, *infra*, in the context of concepts then prevailing, these trials appear to have been regarded as having taken place in time of war.

E. *The peacetime military jurisdiction exercised over civilians from 1825 to 1860 was episodic in the extreme and similarly reflected illegality, rather than authoritative constitutional interpretation.*

The last trial of a civilian recorded in General Wilkinson's Order Book was on November 19, 1798 (No. 39); the last entry in that collection is dated April 23, 1808; the War Department series of recorded military trials (*Proceedings of Courts-Martial, War Office, MSS., Nat. Arch.*) begins then; but neither party has found any military trials of civilians between 1798 and 1827.

For the sake of completeness, two intervening items should be noticed.

(i) Isaac Maltby, a Brigadier General in the Massachusetts Militia but probably no lawyer,¹² published in 1813 *A Treatise on Courts Martial and Military Law*. At p. 31 of that work, citing only AW-60 of 1806, he says:

"In the regular army, all the individuals of which it is composed, whether officers or soldiers, are amenable to courts martial; also all persons attached to the army, and all persons serving with, or doing business for the army."

Literally, of course, this would include dependents on a post in a settled area of the United States as well as contractors with the army; as a correct statement of constitutional law, therefore, the expression cannot be taken too seriously.

(ii). In the *General Regulations for the Army* of 1825, revised by General Scott, Article 341, dealing with sutlers, states:

¹² The only reference we have found concerning him shows only that he was a graduate of Yale College. Wells and Wells, *A History of Hatfield, Massachusetts* (1910) 254.

"341. Every sutler shall hold his appointment during the pleasure of the Secretary of War; but besides his amenability under the 60th article of war, he may be suspended from the privilege of sutling by the commander of the post, on the recommendation of the council of administration, till the orders of the Secretary of War be received in the case."

Here again, AW 60 of 1806 was read broadly, which may account for the seven trials cited by the Government (Pet. Br., No. 21, p. 56, note 37).

1. *William Armistead*, Sutler at Fortress Monroe (No. C 68, MS., Nat. Arch.), April 1825.

The accused was charged with (1) Mutiny and Violation of Duty and (2) Conduct subversive of good order and discipline, in detaining two Negroes bringing shoes into the post by order of the Chief Engineer. A plea to the jurisdiction was rejected, after which the trial resulted in Armistead being "honorably acquitted."

2. *Jabez Burchard*, Sutler at Fort Washington, Md. (No. V 15, MS., Nat. Arch.), December 1825.

A plea to the jurisdiction was overruled on the authority of Art. 341, Gen. Regs. of 1825. (*supra*).

The accuser, Lt. Childs, was a member of the court, but a challenge on that basis was overruled, and this officer duly testified for the prosecution, the charge being that the accused sent him "a highly disrespectful note."¹³

Burchard was found guilty and sentenced to be dismissed as a sutler, the court recommending reinstatement "in consideration of his former correct deportment."

¹³Under AW 4 of 1916 through 1948 and under Art. 25(d)(2), UCMJ, an officer who is the accuser or a witness for the prosecution is not eligible to be a member of the court.

3. William O. West, Sutler to Cos. E & K, 7th Inf., tried by regimental court-martial at Fort Gibson (No. BB 149, MS., Nat. Arch.), August 1833. Fort Gibson was in Indian Territory (2 Heitman 502); it is now the site of the city of the same name in Muskogee Co., Oklahoma.

The court was appointed by Col. Arbuckle, who was a witness for the prosecution, and therefore an accuser. (Had this been a general rather than a regimental court-martial, it could not, in view of the Act of May 29, 1830, c. 13, 4 Stat. 417, have been appointed by an accuser.)

West was charged with six specifications of disobedience of orders, *viz.*, selling whiskey to the troops, and found guilty on five; he was sentenced to be suspended from sutling until the pleasure of the "Secretary at War" be known. The court recommended the dismissal of one Flowers, the accused's partner, from further sutling, "as an unfit person to be about the garrison." The court also recommended "the dismissal from the Post, and its neighborhood" of three named "Laundresses of the 7th Infantry; it being the opinion of the Court, that they testified falsely, before it."

Col. Arbuckle, the convening authority, approved so much of the sentence as suspended the accused from sutling and directed the closing of his store, and ordered that portion carried into execution. He then added:

"The remainder of the sentence is disapproved of, as it is regarded as the exclusive duty of those authorized to constitute Courts Martials, to act definitely on their proceedings."

"The recommendations of the Court in relation to B. W. Flowers and others who were not on trial, however censurable their Conduct may have appeared by the testimony before the Court in the Case of W. O. West; it is unprecedented, and was a total

departure by the Court from its duties, and it is therefore disapproved, and regarded highly exceptionable."

4. J. W. Wiese, "a follower of the Army (Clerk to Dellam & Hambaugh, Army Sutlers)," tried at Fort Brooke, East Florida (No. CC 488, MS., Nat. Arch.), Sept. 1838. Fort Brooke was at the site of the present city of Tampa, Florida.

Wiese was charged with violation of general orders and the order of the Quartermaster's Dept., *viz.*, 4 specifications of selling liquor to teamsters in the employ of the Quartermaster at Fort Brooke.

"The Court are of opinion that it has jurisdiction over the Case, but in consequence of the Prisoner being only a Clerk to the Sutler and not the responsible person, decide to proceed no further in the prosecution against him."

In Order No. 58, Hq. Army of the South, Fort Brooke, Sept. 17, 1838, Brig. Gen. Z. Taylor commanding (MS., Nat. Arch.), which announces the results of other cases tried by the same court, there is no mention of this case.

Whether Fort Brooke was "in the field" in the setting of the then subsisting Seminole War (cf. Upton, *The Military Policy of the United States* (1917 ed.) 185-186), whether the courts of the Territory of Florida established pursuant to the Act of March 30, 1822, c. 13, 3 Stat. 654 (cf. *American Insurance Co. v. Canter*, 1 Pet. 511) were actually functioning in that area, need not be determined.

All of the four trials of sutlers just enumerated took place when there were no lawyers whatever in the Army: The judge advocates provided for in Sec. 2 of the Act of April 14, 1818, c. 61, 3 Stat. 426, were dropped in the

reorganization effected by the Act of March 2, 1821, c. 13, 3 Stat. 615, and the office of Judge Advocate of the Army was not again established for 28 years more, by Sec. 4 of the Act of March 2, 1849, c. 83, 9 Stat. 351.

As is pointed out below, pp. 66-70, when the question of military jurisdiction over the post trader, successor to the sutler, was thereafter presented for a legal opinion. The Judge Advocate General held that such persons were not subject to court-martial except in the field in time of actual hostilities.

And, unless it is now contended that a similar jurisdiction may constitutionally be exercised over civilians at Fort Monroe, Virginia, or at Fort George G. Meade, Maryland, the first two instances cited show only that subordinate military commanders on occasion acted illegally. Indeed, all of these cases are curiosities rather than constitutional precedents.

It remains to consider the three trials of accompanying civilians in 1858 cited by the Government.

5. *James Traler*, "a citizen in the Quarter-Master's employ" (No. HH 882, MS., Nat. Arch.), tried at Camp Scott, Utah Terr., in February 1858.

The charge was conduct prejudicial to good order and military discipline, the specification stealing a pistol from the Ordnance Department.

Finding, Guilty: sentence, 6 months' confinement at hard labor, "wearing a ball and chain attached to his leg weighing twenty-five pounds."

The sentence was approved by the Department Commander, Col. Albert Sidney Johnston, and after three weeks the unexecuted portion thereof was remitted.

6. *William C. Barnard*, "an employee in the Quartermaster's Department" (No. HII 895, MS., Nat. Arch.) tried at Camp Scott, Utah Terr., in March 1858.

Same charge as the preceding, but the specification was that the accused stole a bar of steel from the Government blacksmith shop and sold it to a civilian storekeeper's clerk. Found guilty and sentenced to 20 days' confinement at hard labor; the unexecuted portion of the sentence was remitted after 16 days.

7. *Henry F. Ringsmer*, "a Retainer in the Army of the United States in the Field" (No. HII 880, MS., Nat. Arch.), tried at Camp Scott, Utah Terr.

Same charge; specification, larceny at Fort Bridger in January 1858 of brandy belonging to the Hospital Department, and possession of such stolen brandy.

Ringsmer had counsel, who objected to the jurisdiction: the judge advocate cited AW 60 and AW 99 of 1806; plea overruled; one member however objected, and put this proposition (p. 5):

"The Court entertain no doubt of their Competency as a judicial tribunal for the trial of the case of Mr. Ringsmer, yet as adjudication by a civil tribunal is within reach, they recommend that the prayer of the accused be granted, and that his case be referred for trial to the District Court of Green River County of the Territory of Utah at its next term."

On the next day, that proposition was withdrawn, and the objecting member submitted the following (p. 6):

"The court recommend that the prayer of the prisoner be granted, and that the case of Mr. Ringsmer be referred for trial to the civil tribunal of Green River County of the Territory of Utah."

This failed, and the jurisdiction was sustained.

The court-martial, however, refused to permit the judge advocate either to impeach a prosecution witness by proof of his prior inconsistent statements, or to cross-examine a hostile prosecution witness, with the result that the accused was acquitted. The findings of not guilty were approved on Feb. 10, 1858.

Thus, in respect of these three cases, the argument in favor of the presently asserted jurisdiction is impaled on a dilemma:

Either the trials took place "in the field" in the context of the Mormon Campaign—see Rep. Sec. War, 1858 (Sen. Ex. Doc. 1, part 2, 35th Cong., 2d sess.), pp. 6-8, 28-223—or else civilians were tried by court-martial in an area where the civil courts were shown to be in operation. In fact, Utah had been an organized territory since 1850, with a full complement of courts. Sec. 9 of the Act of Sept. 9, 1850, c. 51, 9 Stat. 453, 455.

On neither possibility do the cases sustain the jurisdiction now asserted (Pet. Br., No. 21, p. 56), *viz.*, at "an organized camp in a remote place where the civil law of the United States was not functioning or could be reached only with difficulty."

We may appropriately close the present heading with the 1859 enactment that purportedly subjected to the Articles of War, "in the same manner as soldiers in the Army," "all persons admitted into the Soldiers' Home." Sec. 7 of the Act of Mar. 3, 1859, c. 83, 11 Stat. 431, 434. This was carried into the Revised Statutes as 4824, into the Code as 24 U.S.C. §54, and reenacted as AW 2(f) of 1916 through 1948.

It was, of course, a jurisdiction patently unconstitutional, as no one is eligible for entrance into the Soldiers' Home

until after his—now also her—discharge from the service; and so The Judge Advocate General of the Army consistently held (Dig. Op. JAG, 1912, p. 1010, ¶IA).

F. *Extensions of military jurisdiction during the Civil War must be regarded with caution.*

Much that was done in the Civil War reflects only *inter arma silent leges* and cannot be seriously accepted as a guide to contemporaneous constitutional interpretation—a warning that must constantly be borne in mind in considering the arguments now advanced in favor of the presently contested military jurisdiction.

(a) It is said (Pet. Br., No. 21, p. 47) that “the constitutional term ‘land and naval Forces’ was not synonymous with ‘armed forces’ or ‘armed services.’” citing Cong. Globe, 37th Cong., 3d sess., pp. 995, *et seq.*

But this overlooks that the 37th Congress is a particularly unreliable guide to the proper scope of Clause 14.

It was the 37th Congress that purported to make contractors subject to trial by court-martial (Sec. 16 of the Act of July 17, 1862, c. 200, 12 Stat. 594, 596), an asserted jurisdiction promptly—and necessarily—held unconstitutional. *Ex parte Henderson*, Fed. Case No. 6349 (C.C.D. Ky.).

It was similarly the 37th Congress that purported to make persons separated from the armed forces subject to trial by court-martial for frauds against the Government, notwithstanding their return to civilian status. Sec. 2 of the Act of Mar. 2, 1863, c. 67, 12 Stat. 696, 697, later AW 60 of 1874; AW 94 of 1916 through 1948; Art. 3(a), UCMJ. The unconstitutionality of such a recapture provision was consistently asserted by Winthrop (*142-*146), and has now been established by *Toth v. Quarles*, 350 U.S. 11.

The 37th Congress had therefore better be politely ignored in the present connection.

(b) Reference is made to an opinion of Judge Advocate General Holt (Pet. Br., No. 21, pp. 56-57) rendered on Nov. 15, 1866, that does not mention the "in the field" limitation.

This "opinion" is primarily remarkable because it does not even mention the Constitution, nor does it contain the slightest suggestion that the trial of civilians by court-martial in time of peace involves a constitutional question, viz., the scope of Art. I, Sec. 8, Clause 14 on the one hand (with or without Clause 18), and the reach of the Sixth Amendment on the other.

Moreover, the Holt memorandum was written a month before the opinions in *Ex parte Milligan*, 4 Wall. 2; see 18 L. Ed. 291 for their date. Therefore, since General Holt was the primary exponent of the policy of military control, through military trials, of political prisoners, see 9 Dict. Amer. Biog. 181, 182-183, his views as to the proper location of the boundary between the civil and the military jurisdiction hardly furnish safe guides today.

Holt was also the prosecutor at the Trial of the Lincoln Conspirators. That performance, although sought to be legally justified (11 Op. Atty. Gen. 215 [one sentence opinion]; 11 Op. Atty. Gen. 297), was bitterly assailed by competent contemporary critics as utterly illegal and completely unconstitutional. Beale, ed., *The Diary of Edward Bates* [Atty. Gen. in first Lincoln Administration] (H.R. Doc. 818, 71st Cong., 3d sess., vol. IV), pp. 481, 483, 498-503. No one since has ever even attempted to sustain that incarnation of anguished passion. Winthrop cites it a few times to illustrate incidental procedural points, but his silence as to its substance is deafening.

It may be noted that one's current impression of the illegality of those proceedings is notably enhanced by the circumstance that, when one of the conspirators obtained a writ of habeas corpus, the Government responded with an Executive Order that suspended the privilege of the writ. Pitman, *The Assassination of President Lincoln and the Trial of the Conspirators*, 250.

(c) In the Confederacy the courts took a narrow view of military jurisdiction. Thus, in 1864, one McKee was tried by court-martial at Alexandria, Louisiana, on charges of holding correspondence with and giving intelligence to the enemy, and of encouraging desertion, on the footing that he was a major and assistant quartermaster, U.S.A. The court-martial found that he had never been formally commissioned, amended the charge sheet to describe him as a person "under control of the military authorities governing said Quartermaster Department of the Confederate States in the Field west of the Mississippi River," found him guilty, and sentenced him to be shot.

Thus McKee was a civilian within the "in the field" limitation. None the less, the Confederate District Court for Louisiana, on habeas corpus, ordered him released. See Robinson, *Justice in Grey* (1941) 199-201, 152-153.

(d) This would be a convenient juncture to mention the enactment that in 1866 purported to subject the inmates of the National Asylum (later called Home) for Disabled Volunteer Soldiers to military law. Sec. 9 of the Act of Mar. 21, 1866, c. 21, 14 Stat. 10, 11. This provision, likewise, was carried into the Revised Statutes as 4835, into the Code as 24 U.S.C. 137, and was not repealed until 1930. Sec. 7 of the Act of July 3, 1930, c. 863, 46 Stat. 1016, 1018. Only one "trial" ever took place thereunder, a performance called by Winthrop (123) "as absurd in fact as it was unwarranted in law"; see Dig. Op. JAG, 1895, pp. 329-330.

*15, for the details. Of course the inmates of that institution were not in military service, see *United States v. Murphy*, 9 Fed. 26 (C.C.S.D. Ohio), and even in Gen. Holt's time the provision was held unconstitutional. Dig. Op. JAG. 1912, p. 1012. *11 (first ruling dated 1870).

G. *Present-day boundaries are fixed, not by the sporadic excesses of the past, but by the considered rulings of the Government's law officers which condemned those excesses as illegal and unconstitutional.*

After the Civil War, when the passions aroused by that conflict had subsided, and after Judge Advocate General Holt's retirement in 1875,¹ the principles of court-martial jurisdiction over civilians were reexamined.

At that time, the classic limitation of that jurisdiction to a time of hostilities and a place "in the field" were forcefully asserted by Judge Advocate General Dunn, and adopted by Attorney General Devens in 16 Op. Atty. Gen. 13 and 16 Op. Atty. Gen. 48.

It is those principles that are so strongly and convincingly set forth in Winthrop *131-138, *142-*146.

In view of the circumstances that these rulings are now sought to be minimized (Pet. Br., No. 21, pp. 59-60), and that in 1957 they were dismissed as "indicating that at that time there was no well-established rule as to what civilians were subject to court-martial jurisdiction in time of peace" (Reply Br. for Appellant and Petitioner on Rehearing, Nos. 701 and 713, Oct. T. 1955), we have set forth in Appendix C the full text of General Dunn's opinions.

We note in passing that it might with equal logic be contended that, until *Toth v. Quarles*, 350 U.S. 11, and *Reid*

¹ After his death in 1894, litigation over his will led to the celebrated case of *Throckmorton v. Holt*, 180 U.S. 552. See Wigmore, *The Principles of Judicial Proof* (1913) 897-989.

v. Corcoran, 354 U.S. 1, there was similarly no well established rule on the same subject.

H. *The fact that after three and a half years the Government still accords silent treatment to The Judge Advocate General's post trader ruling is eloquent evidence of the importance of that ruling in the present connection.*

A well-nigh conclusive answer to the argument that all civilians accompanying the forces were traditionally subject to court-martial jurisdiction, but particularly those civilians who were closely connected functionally with the operations of the Army, is found in the ruling on the amenability of the now all but forgotten post trader.

Post traders were in existence for about a generation, after the sutler was legislated out of existence effective July 1, 1867—by Sec. 25 of the Act of July 28, 1866, c. 299, 14 Stat. 332, 336—and before post canteens had been transformed into the now familiar post exchanges in 1892.¹

Both by the Joint Resolution of March 30, 1867, No. 33, 15 Stat. 29, as well as by Sec. 22 of the Act of July 15, 1870, c. 294, 16 Stat. 315, 319-320 (later R.S. 1113), it was declared

"Although further appointments of post traders were terminated by the Act of January 28, 1893, c. 51, 27 Stat. 426, their disappearance overlapped the emergence of the successor institutions. Post canteens had long been organized; their formal regulation, however, appears to date from G.O. 10, Hq. of the Army, 1889. By G.O. 11, Hq. of the Army, 1892, it was directed that 'The institution now designated as the Post Canteen will be hereafter known as the Post Exchange,' and the Act of July 16, 1892, c. 195, 27 Stat. 174, 178, reflected the new designation.

Other accounts of the emergence of the post exchange (*Standard Oil Co. v. Johnson*, 316 U.S. 481, 483-484; *Dugan v. United States*, 34 U. Cls. 458; *Kenney v. United States*, 62 C. Cls. 328, 335n.-336n.) appear to overlook or to misread the earlier directives.

"That such traders shall be under protection and military control as camp followers."

Moreover, by Sec. 3 of the Act of July 24, 1876, c. 226, 19 Stat. 97, 100—which according to the Attorney General (15 Op. Atty. Gen. 278, 280) did not repeal R.S. §1113, *supra*—it was further provided that every post trader

"shall be subject in all respects to the rules and regulations for the government of the Army."

The generality of the quoted provisions differs not at all from the broad language of the contemporaneous camp-follower provision, AW 63 of 1874, which declared that

"All persons serving with the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders, according to the rules and discipline of war."

According to the Government's reading of the pre-1916 Articles of War (Pet. Br., No. 21, pp. 33, 52-61), it would follow that Congress had thereby subjected post traders to trial by court-martial. But The Judge Advocate General of the Army held precisely the contrary. He said, in three successive editions of his published opinions (Dig. Op. JAG, 1901, p. 563, ¶2023; *id.*, 1895, pp. 599-600, ¶4; *id.*, 1880, p. 384, ¶4):

"A post trader is not, under the Act of 1876, and was not under that of 1867 or 1870, amenable to the jurisdiction of a military court in time of peace. The earlier statutes assimilated him to a camp-follower, but, strictly and properly, there can be no such thing as a camp follower in time of peace, and the only military jurisdiction to which a camp follower may become subject is that indicated by the 63d Article of War,

viz. one exercisable only 'in the field' or on the theatre of war. Nor can the Act of 1876, in providing that post traders shall be 'subject to the rules and regulations for the government of the army', render them amenable to trial by court martial in time of peace. * * *

If the Articles of War are intended to be included, the amenability imposed is simply ~~that~~ fixed by the particular Article applicable to civilians employed in connection with the Army, *viz.* Art. 63, which attaches this amenability only in time of war and in the field. Thus, though post traders might perhaps become liable to trial by court martial if employed on the theatre of an Indian war, as persons serving with an Army in the field in the sense of that Article, they cannot be made so liable when not thus situated * * *."

That ruling completely undercuts the view, expressed in a number of recent judicial opinions (including some now under review here),¹⁶ that the traditional military jurisdiction over accompanying civilians was exercised and properly exercisable at all times and in all places.

The foregoing ruling is duly noted in Winthrop's 1st edition (1886) at 131, where the author records that the post trader since 1867 has superseded the sutlers formerly authorized, and that (131, note 2) "No trial of a trader by court-martial has ever been had or ordered."¹⁷

¹⁶ E.g., Judges Holtzoff and Burger in *Guagliardo*, No. 21, R. 28-31, 47-50; Judge Arraj in the present case, R. 63-69; *In re Varnay's Petition*, 141 F. Supp. 190 (S.D. Calif.); *In re Yokoyama*, 170 F. Supp. 467 (S.D. Calif.).

¹⁷ We have not been able to find the full text of the post trader ruling in the National Archives. A short abstract appears in the letter from The Judge Advocate General to the Secretary of War, Jan. 26, 1878 (39 Bureau of Mil. Justice—Letters Sent 395, MS., Nat. Arch.), where it is said that the legality of a state tax or license fee on a trader is a question for the state courts.

The post trader ruling was first cited on behalf of Mrs. Covert at the first hearing of her case, in a brief filed in April 1956. Brief for the Appellee, No. 701, Oct. T. 1955, pp. 46-47.

The circumstance that this ruling was never mentioned by the Government there, either at the original hearing or at the rehearing, and that it is nowhere mentioned by the Government at the present Term, in any of the briefs filed up to now, either in No. 21, or in No. 22, or in this case, must surely be regarded as significant.

It may show that the Government regards the post trader ruling, at least reflexly, as too important or too dangerous to notice. It may show, alternatively or additionally, that the arguments in support of the jurisdiction now in question cannot be regarded either as accurately setting forth or as accurately evaluating the state of the authorities.

No doubt the Court will be able to appraise the matter adequately without further comments on our part.

It is sufficient now to point out the tremendous change that the rulings discussed in the preceding subheading and set out in Appendix C, as well as the ruling regarding the post trader, effected in the contents of the next edition of the Digest of Opinions of The Judge Advocate General of the Army.

The 1868 edition, the last prepared under the supervision of General Holt, contained not only his rulings upholding the trials of civilians by military commission that had been condemned in *Ex parte Milligan*, 4 Wall. 2, see Dig. Op. JAG, 1868, pp. 225-232, but contained as well (p. 84) his 1866 memorandum regarding the scope of court-martial jurisdiction over civilians that is printed in Pet. Br., No. 21, pp. 56-57.

In the 1880 edition, the first under the new regime, all of the foregoing are omitted, and instead there are digested the restrictive rulings of the 1870s. Dig. Op. JAG, 1880, pp. 48-49, 211-212, 384.

It is indeed a strange evaluation that prefers the discarded rulings of a regime whose overreaching had met with such signal judicial disapprobation to those of a new set of law officers whose lodestar was a strict enforcement of the Constitution that they had sworn to support and defend.

1. *No constitutional justification was ever offered in 1916 for the extension of military jurisdiction then enacted, nor at any time thereafter.*

Under this heading, we incorporate by reference the matter at pp. 99-100 of the *Singleton* brief in No. 22.

We emphasize that, in 1916, when the by then traditional limits of military jurisdiction were expanded at General Crowder's urging,² no constitutional justification for the extension was offered.

Gen. Crowder was anxious to reach cases such as that of the thieving quartermaster clerk in the 1906-1909 intervention in Cuba, who had gone unwhipped of punishment because of an amnesty proclamation. Sen. Rep. 130, 64th Cong., 1st sess., p. 38.

For the rest, his premises were notably inarticulate; significantly enough, both have since been rejected by this Court.

- (1) He assumed that when the Army was overseas it was (p. 32) "away from the protection of constitutionally guaranteed rights," a proposition no longer tenable under cases subsequent to 1916: *Baltac v. Porto Rico*, 258 U.S. 298, 312;

United States v. Curtiss-Wright Corp., 299 U.S. 304, 318; *United States v. Belmont*, 301 U.S. 324, 332; *United States v. Pink*, 315 U.S. 203, 226.

(2) He assumed (p. 70) that the test of jurisdiction was whether a case arose in the land and naval forces, viz., that the Fifth Amendment conferred military jurisdiction. *Toth v. Quarles*, 350 U.S. 11, 14, exploded this notion, which indeed Winthrop (*53) had never accepted for a moment. See *Singleton* brief in No. 22, pp. 101-102.

But the mystery of the 1916 Revision still remains: Why did Gen. Crowder never refer to the contrary views set forth in Winthrop, and similarly set forth in the 1912 Digest of Opinions that had just been published under his own direction?

J. On the only occasions from 1793 to 1916 when the Attorney General and The Judge Advocate General of the Army gave reasoned consideration to the question whether trials of civilians by court-martial in time of peace contravened constitutional limitations, they answered that question with a resounding affirmative.

The foregoing survey of the historical and administrative materials relating to military trials of civilians in time of peace shows several distinct periods.

1. In the first, from 1793 to 1798, numerous civilians were tried by court-martial. Only a limited number of those trials fall within the narrow limits for which the Government now contends. The jurisdiction then exercised represents primarily the imperious tempers of the commanders concerned, and renders understandable the conflict between civil authorities and the army that was prevalent at the time. There is no showing whatever of executive or legislative acquiescence, much less of ratification, and the only

contemporary expressions from higher authority, by President Washington himself, emphasize the subordination of the military to the civil authority. In short, the precedents of the 1790's cannot in any sense be considered as infused into the contemporary reading of the Constitution. They belong to history only insofar as history necessarily comprehends a recital of past abuses.

2. The second period, from 1825 to 1858, at a time of great military activity over a wide area by a small but highly professional force, has yielded up only seven scattered trials of civilians by court-martial in peacetime, most of which took place where the civil courts were functioning. Those instances are far too sporadic to establish a settled practice—and to the extent that they do, it is the palpably illegal practice of trying civilians by court-martial in areas served by civil courts.

3. The third period is that of the Civil War and its immediate aftermath, primarily notable in the present connection as presenting the first occasion on which the legality of military trials of civilians in peacetime appears to have been formally considered by one of the Army's law officers.

General Holt's memorandum on that occasion (Pet. Br., No. 21, pp. 56-57; Dig. Op. JAG, 1868, p. 84) does not discuss the constitutional question, and is moreover unpersuasive since it was written just before *Ex parte Milligan*, 4 Wall. 2, set the final seal of constitutional disapproval on the system of military trials of civilians that represented his unique contribution to the conduct of what in United States Government circles was then always described as the War of the Rebellion. The authority of General Holt, accordingly, had better not be invoked to support a military jurisdiction over civilians.

4. The next period, from 1877 to 1912, represents the classic period of American military law, when Winthrop wrote his still authoritative work, and when The Judge Advocate General of the Army so vigorously insisted on the Army's observance of constitutional limitations that, when the Attorney General in a momentary lapse had purported to approve military trials of civilians, he recalled to that officer the principles involved, and obtained ultimate disapproval of such trials. See the memoranda printed in Appendix C.

This period also saw the publication of no less than four editions of the Digest of Opinions of The Judge Advocate General of the Army, in 1880, 1895, 1901, and 1912. All of those editions announced the principle that no civilian was constitutionally amenable to trial by court-martial in time of peace. The first three, see page 67, *supra*, also stated that "strictly and properly, there can be no such thing as a camp follower in time of peace," a holding omitted from the 1912 edition only because the class of persons concerning whom this had been said—the post traders—had ceased to exist.

5. The fifth period begins with 1916, when General Crowder successfully urged on Congress the AW 2(d), now the Art. 2(11), jurisdiction. But he undertook no constitutional justification for this extension of court-martial jurisdiction, nor did he even suggest that a constitutional question was involved. It is therefore not possible to attach to Gen. Crowder's position the same weight to which the reasoned expositions of his predecessors in the earlier period are entitled, particularly since both of his inarticulate major premises have since been shown to be unsound.

This fifth period rests, doctrinally, on the assumption that military jurisdiction is properly exercised over all

"cases arising in the land or naval forces," i.e., that the exception in the Fifth Amendment constitutes a grant of military jurisdiction. Although Winthrop had with unerring perception pointed out the fallacy of this assumption (*53), it was uncritically embraced by courts and commentators alike, and was not finally laid to rest until *Toth v. Quarles*, 350 U.S. 11, in 1955.

If, therefore, the long continued practice of the officers charged with the administration of a statute is to be given effect, and if that practice is to be considered most weighty when it is supported by a reasoned exposition of the factors shaping it, then, very plainly, the military practice from 1877 to 1912 is the most persuasive of all in demonstrating that trials of the nature now under consideration are not authorized by the Constitution and violate the guarantees of the Bill of Rights.

We cannot forbear to add that the Government appears to share this view, since it has meticulously failed to discuss (or even cite) the opinions of The Judge Advocate General of the Army appearing in the 1880, 1895, 1901, and 1912 editions of the Dig. Op. JAG, and since, if consistent silence is any indication, it seems not yet prepared to acknowledge the existence of the post-trader ruling.

IV. No Controlling or Indeed Persuasive Judicial Authority Sustains the Peacetime Military Jurisdiction Over Civilians That Is Now Asserted.

We discuss "the decided cases" (Pet. Br., No. 21, pp. 61-66) only for the sake of completeness; after all, even a consistent series of lower court cases does not foreclose this Court's examination of the basic constitutional question involved.

It is only necessary to refer to the recapture provision of 1863, that was carried into AW 60 of 1874, AW 94 of

1916 to 1948, and finally into Art. 3(a), UCMJ. The constitutionality of that enactment was fairly consistently sustained over a long period: *In re Bogart*, 2 Sawy. 396, Fed. Case No. 1596 (C.C.D. Calif.); *Ex parte Joly*, 290 Fed. 858 (S.D.N.Y.); *Terry v. United States*, 2 F. Supp. 962 (W.D. Wash); *United States v. Hildreth*, 61 F. Supp. 667 (E.D. N.Y.); *Kronberg v. Hale*, 180 F. 2d 128 (C.A. 9), certiorari denied, 339 U.S. 969. Yet this Court on more complete consideration held the provision invalid. *Toth v. Quarles*, 350 U.S. 11.

A. *What was said in Duncan v. Kahanamoku was dictum and moreover cited wartime cases.*

In *Duncan v. Kahanamoku*, 327 U.S. 304, 313, this Court said:

"Our question does not involve the well established power of the military to exercise jurisdiction over * * * those directly connected with such [armed] forces * * *"

—and cited four wartime cases, *Ex parte Gerlach*, 247 Fed. 616 (S.D.N.Y.); *Ex parte Falls*, 251 Fed. 415 (D.N.J.); *Ex parte Jochen*, 257 Fed. 200 (S.D. Tex.); and *Hines v. Mikell*, 259 Fed. 28 (C.A. 4), certiorari denied, 250 U.S. 645, all of which were either in fact or else held to be "in the field."

We have added the italics in the quotation to emphasize that the Court was not considering the question now before it and that whatever was said was dictum on its face; and we have done so primarily because the italicized words do not appear in any of the quotations from the *Duncan* case set forth in Pet. Br., No. 21, at pp. 60, 65, 66.

Otherwise stated, the Government nowhere discloses that the remarks on which it now relies were *obiter*.

Once that circumstance is borne in mind, it becomes apparent that the argument in support of the jurisdiction is being rested on a few words mentioned *arguendo* to show what was not being decided, and that those words are now being put forward on the footing that the Court passed on what it plainly said was not involved.

B. *The lower court cases relied on are either not in point or else quite unpersuasive.*

Apart from the decisions now under review, we have found 16 cases that involved a test of military jurisdiction over civilians. We have divided these into several categories, duly labeled; an asterisk preceding the citation indicates that the decision does not appear in any Government brief presently filed.

(1) The first group includes all wartime cases arising "in the field" as that term was always rigidly and narrowly interpreted both by The Judge Advocate General of the Army as well as by the Attorney General. See rulings collected at pp. 29-32 of the *Singleton* brief in No. 22.

1. *Ex parte Gerlach*, 247 Fed. 616 (S.D.N.Y.) (Army transport on high seas, World War I).
2. *In re Di Bartolo*, 50 F. Supp. 929 (S.D.N.Y.) (Eritrea in World War II).
3. *Hammond v. Squier*, 51 F. Supp. 227 (W.D. Wash.) (merchant mariner in South Pacific, World War II; jurisdiction not sustained).
4. *In re Befue*, 54 F. Supp. 252 (S.D. Ohio) (Army vessel on high seas, World War II).
5. *Perlstein v. United States*, 151 F. 2d 167 (C.A. 3), certiorari granted, 327 U.S. 777, and dismissed because moot, 328 U.S. 822 (Eritrea in World War II).

- *6. *Shilman v. United States*, 73 F. Supp. 648 (S.D. N.Y.), reversed in part, 164 F. 2d 649 (C.A. 2), certiorari denied, 333 U.S. 837 (Tunisia in World War II).

The *Perlstein* case seems doubtful. There the relator had left Eritrea and proceeded to Egypt; he was apprehended in Egypt, and returned to Eritrea for trial. It may well have been this aspect of a wartime "in the field" case that induced the granting of certiorari—a circumstance, which, as it happens, is not cited in the citation at Pet. Br., No. 21, p. 64. Cf. *Toth v. Quarles*, 350 U.S. 11.

(II) A second category of cases arose in occupied territory after the close of World War II. There the military jurisdiction, if exercised without discrimination, could be supported by the doctrine of *Madsen v. Kinsella*, 343 U.S. 341. In fact, however, compare pp. 92-96 *infra*, the jurisdiction appears to have been asserted under AW 2(d) of 1920, and the opinions sustained it on the basis of that provision.

7. *United States v. Handy*, 176 F. 2d 491 (C.A. 5), certiorari denied, 338 U.S. 904 (occupied Germany, 1948).
8. *Grewe v. France*, 75 F. Supp. 433 (E.D. Wis.) (occupied Germany, 1946).

(III) A third group of wartime cases involved the exercise of military jurisdiction over civilians in the United States in both World Wars on the footing that they were "in the field."

9. *Ex parte Falls*, 251 Fed. 415 (D.N.J.) (cook leaving Army transport at pier in Brooklyn, N. Y.).
- *10. *Ex parte Weitz*, 256 Fed. 58 (D. Mass.) (contractor's employee at Camp Devens, Mass.; jurisdiction not sustained).

11. *Ex parte Jochen*, 257 Fed. 200 (S.D. Tex.) (quartermaster employee on the Mexican border).
12. *Hines v. Mikell*, 259 Fed. 28 (C.A. 4), certiorari denied, 250 U.S. 645 (quartermaster's stenographer at Camp Jackson, S.C.).
13. *McCune v. Kilpatrick*, 53 F. Supp. 80 (E.D. Va.) (cook leaving Army transport at Norfolk).
- *14. *Walker v. Chief Quarantine Officer*, 69 F. Supp. 980 (D.C.Z.) (engineer employee in Panama Canal Zone; jurisdiction not sustained).

Such of the foregoing cases as sustained the military jurisdiction cannot, it is submitted, be regarded as sound. In the sense expounded by General Devens (14 Op. Atty. Gen. 22), no part of the continental United States, excepting only the westernmost Aleutians in 1942-1943, was ever "in the field" in either World War, and to hold otherwise was simply semanticized assertion: military operations were not in fact in progress. Those cases ignored Washington's sage admonition (34 *Writings of Washington* 160), "that the whole country is not to be considered as within the limits of the camp."

Moreover, the reasoning of the World War I cases—which set the pattern—leaves much to be desired. In *Jochen*, for instance, the Mexican Border was held to be "in the field" because service there was "field service" within the terms of a Quartermaster Manual. In *Hines v. Mikell*, South Carolina was held to be "in the field" because Army Regulations and pay statutes so regarded Camp Jackson for purposes of allowing military personnel the commuted value of their quarters. Why those circumstances justified withholding the protection of the Sixth Amendment from civilians is nowhere discussed in those opinions.

(It might also be noted that both *Falls* and *Jochen* proceeded on the now rejected view that the Fifth Amendment constitute a grant of military jurisdiction.)

In any event, none of the foregoing were peacetime cases, such as the ones now before the Court.

(IV) Two recent district court decisions do uphold the jurisdiction now asserted.

15. *In re Farnum's Petition*, 141 F. Supp. 190 (S.D. Calif.) (civilian employee of Army in Japan in 1955).

16. *In re Yokonuma*, 170 F. Supp. 467 (S.D. Calif.) (same, in 1958).

We do not find either of these opinions persuasive, essentially because neither takes into account the circumstance that the law officers of the Government consistently limited the operation of "in the field" to a time and place where military operations were in progress. It may be noted in addition that the court in *Farnum* specifically refused to follow Judge Tamm in the *Covert* case below, and that the opinion came down while *Covert* was *sub judice* here; and that the court in *Yokonuma* seems to be still unaware that the 1956 opinions in *Krueger* and *Covert* have been withdrawn. See 170 F. Supp. at 473, note 25.

(V) Finally (Pet. Br., No. 21, p. 65, note 44), reference is made to rulings by the Court of Military Appeals that sustained the jurisdiction of courts-martial under Art. 2(11), UCMJ. That tribunal similarly sustained court-martial jurisdiction over Mrs. Dorothy Krueger Smith (*Smith*, 5 USMA 314, 319), after which this Court held that no such jurisdiction existed, *Kinsella v. Krueger*, 354 U.S. 1.

The simple answer is that the question involved, in all of the cases presently before this Court, is the extent of military jurisdiction under the Uniform Code, which includes of course the scope of the Court of Military Appeals' own jurisdiction. Consequently the views of that tribunal as to its own powers are plainly not authoritative when those very powers are in issue. Significantly enough, every ruling of the Court of Military Appeals now cited antedates *Reid v. Covert*, 354 U.S. 1.

The result is that, of the decisions of Federal courts of general jurisdiction now relied on, only four deal with trials of civilians by court-martial in time of peace. All but one of those was decided before *Reid v. Covert*, 354 U.S. 1, and the sole exception appears unaware that the first opinions in that litigation have been withdrawn.

It follows that the relevant residue of the Government's judicial authorities is not in any sense impressive—an observation that can hardly be dismissed as overstatement.

V. The Government's Arguments as to the Alleged Necessity of Trying Civilian Employees by Court-Martial and the Alleged Lack of Acceptable Alternatives Are Incomplete to the Point of Being Misleading.

We incorporate by reference the discussion at pp. 106-107 of the *Singleton* brief in No. 22 with reference to the basic inconsistency between *Wilson v. Girard*, 354 U.S. 524, and the present contentions now being made in support of the military jurisdiction; as well as the suggestion, pp. 108-109 of the same brief, that the Court should call for the production of named recent agreements with foreign countries, agreements which cast doubt on the assertion (Pet. Br., No. 21, p. 76) that all American civilians with the armed forces live in purely American communities.

We pause to note that, although the NATO agreement concedes primary jurisdiction over civilian dependents to the receiving state, it leaves primary jurisdiction over civilian employees to the sending state. What is said in *Singleton* concerning the NATO agreement is consequently inapplicable in this case.

Here again, we will not undertake a point-by-point refutation of the Government's contentions, but will simply note here the significant matters that those contentions fail to mention:

- A. *The Government omits to advise the Court that the reason why so many civilian employees are now accompanying the armed forces abroad is purely budgetary.*

Nowhere in the lengthy argument on "practical necessity" (Pet. Br., No. 21, pp. 71-82) is there any mention of the budgetary considerations underlying the presence of so many civilian employees with the armed forces abroad. Yet this fact can easily be established by reference to materials of unimpeachable authenticity.

1. In 1954, the House Committee on Appropriations told the Army (H.R. Rep. 1545, 83d Cong., 2d sess., p. 16) that "one obvious alternative to military manpower is the use of more civilians whose annual cost is considerably less, on the average, than that of the man in uniform."

Sec. 720 of the Defense Appropriation Act of that year (Act of June 30, 1954, c. 432, 68 Stat. 337, 354), therefore authorized the substitution of civilian for military personnel "whenever, in the opinion of the Secretary of the Military Department concerned, the direct substitution of civilian personnel for an equivalent or greater number of military personnel will result in economy without adverse effect upon national defense * * *"

Accordingly, the Army undertook the process of substituting 11,888 civilians for 12,495 military personnel under the title "Operation Teammate." See *Department of the Army Appropriations for 1956*, Hearings before the Subcommittee of the House Committee on Appropriations, 84th Cong., 1st sess., pp. 4, 74, 296-297, 459-463, 1124-1126. As expressed by Brig. Gen. Westmoreland of the Personnel Division of the Army's General Staff (*id.*, pp. 459, 1125):

"In general terms, this policy provides for the maximum use of civilian personnel in all positions which do not require military skills or military incumbents for reasons of training, security, or discipline.

.

"What we are doing is changing the composition of our military-civilian work force by increasing the percentage of civilians."

An official comment on Operation Teammate (*Army Information Digest*, Vol. 10, No. 4 (April 1955), p. 47) was that "The program will permit the Army to retain in service a number of combat units which otherwise would have been inactivated due to reduced personnel ceilings."

In the following year, Congress was advised of the savings effected by Operation Teammate. *Department of the Army Appropriations for 1957*, Hearings before the Subcommittee of the House Committee on Appropriations, 84th Cong., 2d sess., pp. 156, 316 *et seq.*, and see particularly the chart at 318 showing actual savings.

2. In this connection, it is an historical fact that "The Navy's Construction Battalions, popularly known as the Seabees, were established to meet the wartime need for uniformed men to perform construction work in combat

areas." 1 *Building the Navy's Bases in World War II. History of the Bureau of Yards and Docks and the Civil Engineer Corps, 1940-1946* (1947) 133. It was found that, when war came, contractors' employees who were civilians not only lacked the training necessary to defend themselves; but could not consistently with international law bear arms against the enemy. *Id.*

3. If, therefore, civilian employees cannot be tried by court-martial and thus subjected to military control in the degree thought necessary by overseas commanders, it is plain that these employees' positions do require "military incumbents for reasons of . . . discipline" (Gen. Westmoreland, *supra*, p. 144), and that civilians cannot be substituted for such military incumbents "without adverse effect upon national defense" (Sec. 720 of the Act of June 30, 1954, *supra*).

In view of the circumstance that these matters were duly disclosed in 1957 (Supp. Br. on Rehearing for Appellee and Respondent, Nos. 701 and 713, Oct. T. 1955, pp. 143 *et seq.*), it seems fair to infer that the Government's failure to deal with them now indicates that no acceptable answer can be formulated.

B. *The Government omits to explain to the Court why, if its civilian employees must be subjected to military discipline, they cannot be incorporated in the armed forces.*

If there is in fact any practical reason why persons like Guagliardo, Wilson, and Grisham must be under military control and discipline—apart from budgetary considerations, which we submit are inadmissible in a situation that concerns constitutional guarantees of individual liberty—why can they not be given actual military status, as the Navy did in the case of its construction workers?

No showing has been made that such a status would be unacceptable, and, if it were, there is ample power at hand to require and compel the service of the necessary individuals. Just as "The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes" (*Buck v. Bell*, 274 U.S. 200; 207), so the power that compels a doctor or dentist to serve in the armed forces (*Orloff v. Willoughby*, 345 U.S. 83; 50 U.S.C. App. §§454a-454e; Act of Mar. 23, 1959, P.L. 86-4, 73 Stat. 13) is ample to compel the service of an electrician (Guagliardo), an auditor (this petitioner), a cost accountant (Grisham), and—if need be—a nuclear physicist.

We submit that it would not be a convincing argument for subjecting civilians to trial by court-martial in time of peace that the United States is not prepared to pay what it would cost to give them military status, or is similarly not prepared to exert its undoubted power to compel their services in a military capacity.

We say, "would not be"; there is no indication in petitioners' brief in No. 21 that either of these rather obvious alternatives has ever been given any substantial consideration.

C. *The cases of the civilian employees now before the Court fail to establish any inseparable connection between them and their offenses and the military forces.*

Apart from generalities of doubtful value, generalities that still rely on the stale and self-serving *ex parte* communications of the very military commanders whose powers are in issue, and that were adduced in 1957, no specific argument is advanced why the particular civilian employees now involved and their particular offenses demonstrate an inseparable or indeed even a close connection with the military forces.

No such specific argument, we submit, can be made.

(1) In *Grisham*, the employee arrived in France in October 1952 (No. 58, R. 12), he lived in an apartment in the city of Orleans (*id.*), and his wife joined him there either late in November or early in December (R. 13). A few days thereafter, on the night of 6/7 December, following a cocktail party at which one of them became drunk, Grisham killed his wife (*Grisham*, 4 USCMA 694, 695).

From the 7th through the 23rd of December, he was in the custody of the French police (*id.*).

We ask, of what possible concern was this purely civilian homicide on French soil to anyone except the French civil authorities? Certainly nothing in Pet. Br., No. 21, pp. 79-82, under the heading "The need for court-martial jurisdiction," even faintly explains why the mere circumstance that Grisham was employed as a cost accountant by Army engineers (No. 58, R. 12), entitled to some amenities as fringe benefits (R. 13-15) but still on the payroll of the U.S. District Engineer at Nashville, Tenn. (R. 11-12, 13, 15), imperatively required his trial by court-martial, or why (Pet. Br., No. 21, pp. 83-89) trial in a French court for homicide would not equally well have insured the success of the American military mission in the Army's Communication Zone.

(2) In this case, a civilian whom two doctors considered "a psychopathic personality on the borderline of schizophrenia" (R. 45, 46), pleaded guilty (R. 24) to a series of sexual offenses with seven individuals (R. 19-22). Only three of the latter were American soldiers; the nationality of the others is not shown, nor does the printed record indicate whether they were connected with the military community.

Since the soldiers in question were punishable for their acts under Art. 125, UCMJ, it is difficult if not impossible

to understand why this petitioner's conduct could not have been adequately dealt with by the German authorities—in indeed his acts were appropriate for criminal prosecution.

In this connection, it seems to us significant that, in legislating for the District of Columbia, Congress has declared that a person found to be a sexual psychopath is to be committed to Saint Elizabeth's Hospital. Act of June 9, 1948, c. 428, 62 Stat. 347, §§201-209; D.C. Code (1951 ed.) §§22-3503 *et seq.*

Why the maintenance of the American military position in Berlin requires similar action on the part of a civilian there to be tried by court-martial, or just how five years' confinement in a penitentiary (R. 8)—petitioner is now at Fitzsimons Army Hospital only because of a tubercular condition—will assist in arresting petitioner's proclivities, is not sought to be explained.

It could not be.

(3) The record of Guagliardo's trial by court-martial, so we are advised by his counsel, shows that he lived in an apartment in the city of Casablanca, and that, like Grisham, he was originally in the custody of and interrogated by, the local authorities. See ACM 14775, *Hall et al.*, 25 CMR 874, 882, review denied, 26 CMR 516.

Guagliardo was charged with stealing property of the United States and with conspiring with two airmen to do so (No. 21, R. 5). Those acts constituted violations of 18 U.S.C. §§641 and 371, respectively, and involved an injury to the interests of the United States. They accordingly applied to American citizens everywhere in the world (*Blackmer v. United States*, 284 U.S. 421; *United States v. Bowman*, 260 U.S. 94), with the result that

¹The question of German jurisdiction is discussed below, p. 100.

Guagliardo and his two co-conspirators could have been flown back to the United States and tried in the first judicial district in which their plane touched American soil. See *Chandler v. United States*, 171 F. 2d 920, 932, 933 (C.A. 1), certiorari denied, 336 U.S. 918, construing Judicial Code, §41, now 18 U.S.C. §238.

Nowhere in the course of their 111 page brief in No. 21 do petitioners ever seek to explain, much less actually explain, why it was either impracticable or unacceptable to pursue that remedy, the constitutional validity of which could not have been questioned.

It is admitted (Pet. Br., No. 21, p. 84) that "foreign courts now try civilian employees and dependents in many cases."

"However," the quoted passage continues, "if the offense involves only American personnel or property, it cannot be expected in every case that the jurisdiction of the foreign tribunals will be invoked with the same vigor as if foreign nationals or property were involved."

That assertion would be more persuasive if it were shown that in Guagliardo's case it was the local authorities who evidenced a lack of vigor, and that they did not simply turn him back to the Air Force because the Air Force authorities insisted in trying him by court-martial on their own.

D. *The contentions in support of the jurisdiction simply repeat what was said in 1956 and 1957 and fail to show any genuine effort to restudy the problem of law enforcement in respect of civilian employees overseas.*

On November 7, 1955, this Court in *Toth v. Quarles*, 350 U.S. 11, 14, said what of course should always have been

obvious, that the "except in cases arising in the land or naval forces" clause of the Fifth Amendment "does not grant court-martial power to Congress." This holding necessarily destroyed every vestige of doctrinal support for peacetime military jurisdiction over civilians. Cf. Morgan, *Court-Martial Jurisdiction over Non-Military Persons under the Articles of War*, 4 Minn. L. Rev. 79, 107.

Mrs. Covert's petition for habeas corpus was filed ten days later (R. 1, No. 701, Oct. T. 1955), and she was released by Judge Tamm on November 22, 1955 (R. 131-134).

Ever since then, and certainly since November 5, 1956, when this Court granted the rehearing in that case (352 U.S. 901), the Department of Defense—which is primarily and perhaps solely interested in this jurisdictional question, the concern of the Department of State being limited to the status of Berlin, as to which see pp. 90, 97, below—even since then, and, preeminently, since June 10, 1957, the date of *Reid v. Covert*, 354 U.S. 1, the Department of Defense has been on notice that military jurisdiction over any civilians in time of peace has been, at the very least, extremely doubtful.

Viewing its arguments in the present quartet of cases as dispassionately as is possible for opposing counsel, we are constrained to say that, after careful consideration of what has been advanced, we find reflected therein no evidence of any restudy of the problem of law enforcement in respect of civilians overseas beyond "Let's see if we can't keep *Reid v. Covert* limited."

Certainly there is no indication that the matter has been presented to or discussed with Congress with a view to new legislation. Indeed, not even the most obvious gaps have been plugged.

Thus, Chapter 37 of Title 18, Espionage and Censorship, applies "within the admiralty and maritime juris-

diction of the United States and on the high seas, as well as within the United States." 18 U.S.C. §791. If persons without military status cannot be tried by court-martial in peacetime, these provisions are on their face insufficient to reach what the Government urges as vital (Pet. Br., No. 21, p. 87), *viz.*, security violations by civilian employees overseas. Yet no effort appears to have been made to extend the scope of this chapter, a matter that raises no constitutional problem whatever (*Blackmer v. United States*, 284 U.S. 421, 437), and which would leave the Government free to return the offender to the United States for trial under 18 U.S.C. §3238.

All that is offered is a rehash of what was presented in 1957, buttressed only by expressions of disagreement with the holding of *Reid v. Covert*, 354 U.S. 1 (Pet. Br., No. 21, pp. 91, 98-99).

The basic approach is still that of the Army Board of Review in Mrs. Dial's case (No. 22, R. 22), that:

"the necessity for military jurisdiction * * * is sufficient to overcome the requirements of Article III and the Fifth and Sixth Amendments."

The infirmities of the argument of necessity were long ago pointed out by this Court, see *Ex parte Milligan*, 4 Wall. 2, 120-121, and Mr. Justice Cardozo with characteristic felicity spoke of preserving our great ideals against "the assaults of opportunism" and "the expediency of the passing hour."¹⁹

¹⁹ "The great ideals of liberty and equality are preserved against the assaults of opportunism, the expediency of the passing hour, the erosion of small encroachments, the scorn and derision of those who have no patience with general principles, by enshrining them in constitutions, and consecrating to the task of their protection a body of defenders. By conscious or subconscious influence, the presence of this restraining power, aloof in the background, but

What is perhaps more immediately pertinent is that, as this brief and the *Singleton* brief in No. 22 amply demonstrate, the Government's present arguments concerning the alleged "practical necessity" and the alleged lack of an "acceptable alternative" omit entirely too much to carry conviction, and that those contentions all too plainly disclose that no real effort has yet been made to find a constitutional substitute for the unconstitutional trials of civilians by court-martial in time of peace.

VI. Even on the Assumption That Berlin Is Still Occupied Territory for All Purposes, Petitioner's Trial by Court-Martial Cannot Be Sustained as an Exercise of Military Government Jurisdiction Over Him.

We will assume (Resp. Br. 14-23) that "Berlin continues under military occupation," for all purposes, and of course we do not question the proposition (*id.*, 8-14) that "Military trials may validly be held in territory under military occupation."

It is our position that it is clear on the present record that no military government jurisdiction was ever sought to be exercised over petitioner; that military jurisdiction over him was never sustained on that basis; that his Art. 2(11) trial cannot now be converted into a military government trial at this juncture; and that, inasmuch as no general military government jurisdiction is now being exercised by the United States forces in Berlin, the purported exercise thereof limited to those civilians who fall within the terms of Art. 2(11) would necessarily be discriminatory and invalid.

none the less always in reserve, tends to stabilize and rationalize the legislative judgment, to infuse it with the glow of principle, to hold the standard aloft and visible for those who must run the race and keep the faith." Cardozo, *The Nature of the Judicial Process*, 92-93.

A. *The Army did not purport to exercise military government jurisdiction over petitioner, his trial was never sustained at any stage on that basis, and it cannot be converted into a military government trial now.*

1. At military law, the charges preferred against an accused who is not in the military service must include "a description of the accused's position or status which will indicate the basis of jurisdiction of a court-martial." MCM, 1951, p. 469, ¶4. This has long been the requirement. MCM, 1949, App 4c, p. 311; MCM, 1928, App. 4c, pp. 236-237; MCM, 1921, App. 6 (g), at p. 566; MCM, 1917, App. 4 (g), p. 335.

The charges in the present case (R. 19-22) consistently describe petitioner as "a person serving with, employed by, and accompanying the armed forces without the continental limits of the United States in Berlin, Germany." Those words copied the then (50 U.S.C. [1952 ed.] §552) language of Art. 2(11), UCMJ.

The charges in the present case did not describe petitioner either as "a person resident in occupied territory in Berlin, Germany," or as "a person subject to the law of war."

Thus it is plain, on the face of the proceedings, that the Army undertook to exercise an Art. 2(11) jurisdiction over petitioner as a civilian employed by the armed forces overseas, rather than an Art. 18 jurisdiction under the law of war applicable in occupied territory.

2. The record shows that the question of military jurisdiction in this case, duly raised at the trial (R. 24, 47-52), was not determined by any judicial agency thereafter on the footing that it could be sustained on the basis of Berlin's status as occupied territory.

The Court of Military Appeals very significantly said (R. 55):

"We prefer to reach the question of jurisdiction in this case under the provisions of subdivision 11 of Article 2 rather than consider whether the circumstances obtaining in Berlin constitute that area of occupied territory, as contended by Army Government counsel."

And the District Court, in the course of a lengthy opinion (R. 60-72), did not rest its sustaining of the military jurisdiction over petitioner on military government grounds, although that point was duly made on behalf of the respondent. Memorandum of Points and Authorities in Support of Return of Respondent to Order to Show Cause, *U. S. ex rel. Wilson v. Bohlender*, D. Colo., Civ. Action No. 6161, Point V, pp. 35-38.

As we shall show, it is now too late to invoke this alleged alternative basis of military jurisdiction.

3. The question at once will be asked, Why is the present situation any different from that of an indictment which, although alleging an offense against the United States, mis-cites the statute that has been violated? In the latter instance, very plainly, the indictment is good. *Williams v. United States*, 168 U.S. 382.

The same rule, that the mis-citation of the Article of War violated does not affect the validity of the charges if they otherwise state an offense under any Article, has long obtained at military law also. See Dig. Op. JAG, 1912-1940, ¶394(2), citing many rulings; MCM, 1951, ¶27; *Olson*, 7 USCMA 460.

4. But military law also includes another rule with respect to jurisdiction, to the effect that if the jurisdiction

of a court-martial is not established at the outset of the proceedings, it cannot be conferred by subsequent ratification. This rule obtained under the Articles of War and has been also applied since the effective date of the Uniform Code.

Thus, under the 1920 Articles of War, in force during all of World War II, sleeping on post by a sentinel was a capital offense in time of war. AW 86; MCM, 1928, ¶14. A special court-martial had no jurisdiction to try capital offenses. AW 13. But under AW 12 the officer competent to appoint a general court-martial had power to refer a capital case to a special court-martial, in which event the sentence adjudged could not exceed that otherwise within the punishing power of the special court-martial.

Even in many overseas areas during World War II, it was utterly unrealistic to consider sleeping on post a capital offense, and accordingly such cases were, in many general court-martial jurisdictions, regularly referred to special courts-martial for trial.

On occasion, however, short-cuts were resorted to, and a sleeping sentinel's case would be referred to a special court-martial by an officer not vested with general court-martial jurisdiction. The question then arose, could the officer who had general court-martial jurisdiction there after ratify those proceedings, which were consistent with his policy, or were they to be regarded as void *ab initio*.

The Judge Advocate General held that unless the trial by special court-martial of such a capital case had been authorized in advance by the general court-martial authority, the proceedings were void *ab initio*, and could not thereafter be ratified by the latter officer. 1 Bull. JAG 143, ¶369(9); 9 Bull. JAG 219, ¶370.

The Court of Military Appeals reached precisely the same result in *Bancroft*, 3 USCMA 3, under Arts. 19 and 113, UCMJ, and ¶15a(1) of 1951 MCM.

We accordingly submit that, once it is established that there is no Art. 2(11) jurisdiction over petitioner, his conviction cannot now be sustained on the basis that, by a process of subsequent judicial ratification on collateral attack, he could have been charged and tried as a resident of occupied territory, although he was in fact charged and tried as a civilian with the armed forces overseas. The principle of the *Bancroft* case and of the predecessor rulings cited forbids.

5. We are aware that the decision of the Court of Military Appeals in *Schultz*, 1 USCMA 512, is opposed to us on that issue. That decision, plainly, is not controlling, and, for reasons about to be stated, we submit that it cannot be supported.

There one Schultz, an American civilian in Japan, was tried for involuntary manslaughter and drunken driving, being described in the charges as "a person serving with the armies of the United States without the territorial jurisdiction of the United States." See 4 CMR at 576-577. It appeared, however, that he had been employed as the manager of a civilian club supported by non-appropriated funds, and that even such employment had been terminated before the charges were served on him. The Court of Military Appeals accordingly held that in those circumstances he was neither a retainer to the camp nor a person accompanying or serving with the armies so as to render him subject to military law under AW 2(d), then still in effect.

However, the court went on to hold that, Japan being at the time under occupation, the military government

jurisdiction of the general court-martial under AW 12 was sufficient to reach Schultz as a person subject to the law of war. This conclusion was reached (1 USCMA at 520) on the footing that "Jurisdiction is a fact, not a matter of pleading," citing *Givens v. Zerbst*, 255 U.S. 11.

We submit that this reliance was misplaced, because the *Givens* case plainly does not extend that far.

There the relator had, while an officer of the Army, been convicted by a general court-martial. On habeas corpus he alleged a want of authority in the officer who convened the court and the failure of the record to show his own status as an officer in the Army. These matters were either within the realm of judicial notice or else proved at the habeas corpus hearing. Therefore, this Court held that the only question presented was (255 U.S. at 19-20):

"In a case such as that before us, where the power to convoke a court-martial is established on the face of the record, and the authority of the court to decide the particular subject before it is therefore undoubted, does the right exist, in the event of a collateral attack upon the judgment rendered, made on the ground that a particular jurisdictional fact upon which the court acted is not shown by the record to have been established, to meet such attack by proof as to the existence of the fact which the court treated as adequately present for the purpose of the power exerted?"

This Court held (255 U.S. at 20):

"Considering that subject in the light stated, we think the court below was right in admitting, as it did, evidence to show the existence of a military status in the accused, since it did not change the court-martial record, but simply met the collateral attack by show-

ing that, at the time of the trial, the basis existed for the exertion by the court of the authority conferred upon it."

Now, since every one of the allegations disputed on habeas corpus clearly appeared on the face of the record of trial by court-martial, and the proof at the hearing on the writ simply went to sustaining those allegations, it seems plain to us that *Givens v. Zerbst* is not authority for substituting entirely different allegations of jurisdiction, as the Court of Military Appeals in *Schultz* thought.

For *Givens v. Zerbst*, 255 U.S. 11, holds, not that "Jurisdiction is a fact, not a matter of pleading" (1 USCMA at 520), but only that the truth of jurisdictional averments in the proceedings of a court of limited jurisdiction can be independently established on collateral attack, and that such proof is not limited to what is found within the four corners of the challenged proceedings.

Nothing in *Givens v. Zerbst*—or in any other case of which we are aware—gives any support whatever to the Court of Military Appeals' *Schultz* doctrine that a proceeding commenced under one head of jurisdiction can, upon appellate challenge, be somehow transformed into a case under a very different head of jurisdiction, least of all when the transformation is sought to be made on collateral attack. For that would "change the court-martial record" (255 U.S. at 20).

Or, to paraphrase a recent observation, "He that takes the jurisdictional sword shall perish with that sword." *Vitarelli v. Seaton*, 359 U.S. 535, 547.

6. We submit, therefore, that a complete answer to the respondent's attempt to sustain military jurisdiction on military government grounds in the present case is the undoubted fact that the jurisdiction was never at any time rested on those grounds.

We do not dispute—indeed we could not dispute—the proposition (Resp. Br. 8-14) that “Military trials may validly be held in territory under military occupation.” We say only that the military government jurisdiction authorized by Art. 18, UCMJ, was never exercised in this case.

B. *No military government jurisdiction has in fact been exercised in Berlin by the United States since May 5, 1955.*

The underlying principles of military government jurisdiction in occupied territory were reaffirmed and restated in *Madsen v. Kinsella*, 343 U.S. 341. Thereafter, when the occupation of Germany by the three Western powers was brought to an end, the United States terminated the jurisdiction and abolished the courts pursuant to which Mrs. Madsen had been tried. And such abolition extended to Berlin as well. Art. 4, *Convention for the Settlement of Matters Arising out of the War and the Occupation*. TIAS 3425, p. 295, at pp. 301-304; Proclamation of May 5, 1955, 32 Dept. of State Bull. 791; Ex. Order 10608, 20 Fed. Reg. 3093.

And this is duly admitted by the Government—although only in a footnote (Resp. Br. 21, note 16):

“Occupation courts in Berlin have presently ceased to function.”

That admission underscores what is amply demonstrated by the present record, namely, that no military government jurisdiction was in fact exercised over this petitioner.

C. *It follows that any attempt to exercise a military government jurisdiction limited to American civilians accompanying the armed forces would be discriminatory and hence invalid.*

In the footnote just cited (Resp. Br. 21, note 16), it is further said,

"The power to convene them [i.e., occupation courts in Berlin] still exists, but the practice now is to refer to a court-martial all criminal cases which might have previously been heard in an occupational court."

Evaluation of the quoted assertion requires that the jurisdiction of military government courts in occupied territory under accepted principles of international law be briefly examined. As this Court pointed out in *Madsen v. Kinsella*, 343 U.S. 341, after a full review of the authorities, the jurisdiction of such tribunals extends to all persons in the occupied territory, and covers not only the enemy nationals of the occupied areas but also all persons of whatever nationality who are resident in that territory, including American civilians accompanying the American forces, such as Mrs. Madsen in that case.

In the United States Zone of Berlin, therefore, that jurisdiction would include:

- (a) German nationals;
- (b) Nationals of other countries (e.g., Britain, France, etc.) resident in that Zone;
- (c) Americans resident in the United States Zone who have no connection whatever with the armed forces, such as business men, representatives of American airlines and the like; and
- (d) Americans actually accompanying, serving with, or employed by the United States Forces there, such as de-

pendents, Government officials actually connected with the forces, and employees like the petitioner.

To the extent therefore, that the asserted military government jurisdiction in Berlin was limited to the last of these four classes, it would, although fair on its face, be a discriminatory jurisdiction, and hence invalid in the classic sense of *Yick Wo v. Hopkins*, 118 U.S. 356, 373-374, of being "applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances." See also, *accord*, *Griffin v. Illinois*, 351 U.S. 42, 17, and cases there cited.

True, the foregoing is a Due Process point, and military government represents an exercise of the war power; but this Court has made it clear that the Due Process Clause limits even an assertion of the war power. *United States v. Cohen Grocery Co.*, 255 U.S. 81; cf. *Ex parte Endo*, 323 U.S. 283.

We should think it extremely doubtful, having regard to the relations existing between the United States and the Federal Republic of Germany, that, notwithstanding the existence of reserved paper powers, any German national or any resident of Berlin, American or otherwise, unconnected with the armed forces, has been tried by an American court-martial or by any other American tribunal in Berlin since May 5, 1955. But unless such a showing can be made, then the present exercise of court-martial jurisdiction over this petitioner cannot be supported by the invocation of Art. 18, UCMJ.

We recognize that it will probably not be necessary to explore the issue of discrimination. For the fact, amply evidenced by this record, is that the United States has not sought to exercise its reserved powers of military gov-

ernment jurisdiction in Berlin when trying by court-martial civilians with the armed forces, but has simply proceeded on the assumption that it was exercising the purported Art. 2(11) jurisdiction over such civilians under the provisions of the Uniform Code of Military Justice. Even the Court of Military Appeals, which must be taken as expressing the authoritative military view in this connection, proceeded on that basis in the present case (R. 55).

In the interest of completeness, a few words should be said regarding the jurisdiction of the German courts in Berlin to deal with petitioner in respect of the offenses with which he was charged.

There are indications in the record (R. 50, 55) that under Allied Kommandatura Law No. 7 he was not subject to the criminal jurisdiction of the Berlin courts. But the Government's brief (p. 21) makes it clear that the American sector commander could authorize the German courts to exercise criminal jurisdiction over any accompanying civilian under Article 1 of this precise Law No. 7 that was cited in the military proceedings. Consequently denial of American military jurisdiction over accompanying civilians in Berlin who commit offenses there would not in any sense mean that they would go unpunished for their acts.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed, with directions to discharge petitioner from military custody forthwith.

Respectfully submitted.

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OCTOBER 1959.

APPENDIX A

Trials of Civilians by Courts-Martial of the Continental Army Recorded in General Washington's General Orders

The *Writings of Washington* have been examined for the period from Washington's assumption of command at Cambridge in 1775 until the relinquishment of his commission in 1783. The first general order appearing therein that announces the result of a trial by general court-martial is dated July 7, 1775 (3:313), the last one bears date of June 16, 1783 (27:46).

Trials of civilian employees are separated from trials of spies and inhabitants; spies were triable under the laws of war, while inhabitants were tried under resolutions of the Continental Congress and not under the Articles of War. See the text, *supra*, pp. 33-35, where this is set forth in detail.

Cases not noted by the Government (Pet. Br., No. 21, pp. 40-42, n. 25) are prefixed by an asterisk.

Part I—Civilian Employees

1. 9:39 Aug. 19, 1777, Edward Willecox, Quarter Master to Captain Dorse's troop.
2. 9:401, Aug. 20, 1777, Jacob Moon, Pay Master to the 14th Va. Regt.
3. 10:359, Jan. 28, 1778, Thomas Scott who acted in the Character of a Waggon-Master.
4. 10:507, Feb. 24, 1778, Mr. Edward Bennett, Forage Master in the Marquis LaFayette's division.
5. 11:441, Mar. 24, 1778, Mr. Vunch Quarter Master to Colo. Livingston's Regiment tried (by his own consent).
6. 11:455, Mar. 26, 1778, Commissary Gambol.
7. 11:254, Apr. 13, 1778, Adam Gilcrest an Assistant Forage-Master.

- *8. 11:280, Apr. 19, 1778, Hugh Baker, Forage Master.
9. 11:367, May 9, 1778, Robert Anderson, late Waggon-Master in the Marquis's Division.
10. 11:487, May 29, 1778, William Whiteman, Waggoner.
- *11. 12:183, Oct. 31, 1778, Nathan Nuthall, Quarter Master to the 3rd No. Carolina Regt.
12. 12:242, July 27, 1778, Mr. James Davison, Quarter Master of Colo. Livingston's Regt.
- *13. 12:415, Sept. 9, 1778, Samuel Bond, Assistant Waggon Master.
14. 12:416, Sept. 9, 1778, Mr. Allen, Quarter-Master to the 2d Pa. Brigade.
15. 13:314, Nov. 23, 1778, George Albin, Express Rider.
- *16. 14:425, Apr. 22, 1779, Commissary Lewes.
17. 15:50, May 14, 1779, Samuel Fleming, Forage Master.
18. 15:365, July 4, 1779, William Shields, Waggon Master to the North Carolina Brigade.
19. 16:127, Aug. 18, 1779, Mr. John Price, Assistant Commissary of Forage.
20. 16:385, Oct. 1, 1779, Benjamin Ballard, late Assistant Commissary of Issues to Gen. Paterson's Brigade.
21. 16:386, Oct. 1, 1779, Mr. Paterson, Assistant Commissary of Hides.
22. 16:400, Oct. 3, 1779, Mr. Thornton Taylor, Conductor of Military Stores to Gen. Woodford's Brigade.
- *23. 16:479, Oct. 17, 1779, Job Scribner a Conductor of Waggon.
- *24. 18:91, Mar. 8, 1780, Mr. Tychnor Deputy Commissary of purchases.
- *25. 18:98, Mar. 9, 1780, Jacob Bailey, Esq., Deputy Quarter Master General.
26. 18:269, Apr. 17, 1780, Mr. Randall, State Clothier for the State of Maryland.

27. 19:208, July 18, 1780, William Hutton, Provost Marshal.
28. 19:468, Aug. 29, 1780, Mr. Israel Weed, Assistant Commissary of Issues.
29. 20:24, Sept. 2, 1780, Reuben George, an express rider.
30. 20:25, Sept. 2, 1780, Joseph Smallwood, a waggoner.
31. 20:961, Sept. 27, 1780, Thomas Thomson, Forage Master to Gen. Hand's Brigade.
32. 20:97, Sept. 27, 1780, Abraham Cooper, a waggoner.
33. 20:154, Oct. 11, 1780, Mr. John Christie, Forage master to Gen. Clinton's brigade.
34. 20:199, Oct. 16, 1780, Mr. Isaac Tichener, Assistant Commissary for the Northern Department.
35. 20:271, Oct. 31, 1780, George Berrien and James Berrien, Boatmen.
36. 21:10, Dec. 24, 1780, Mr. Benjamin Stevens, issuing Commissary at Fishhill.
37. 21:22, Dec. 28, 1780, Mr. Thomas Dewees, Barrack master.
38. 21:215, Feb. 11, 1781, Mr. Joseph Bass, clothier for the State of New Hampshire.
39. 21:354, Mar. 23, 1781, John Collins, late Assistant Deputy Commissary of Military Stores (see 21:190).
40. 21:496, Apr. 23, 1781, Mr. William Hutton, Provost Marshal.
41. 22:423, July 27, 1781, John Adam, Deputy Commissary of Prisoners.
42. 26:261, Mar. 27, 1783, Mr. Samuel Evans, Forage Master.
43. 26:445, May 19, 1783, Mr. Bartholemew Fisher, Forage master.

Part II—Spies and Inhabitants

- 44. 45. 10:508, Feb. 24, 1778, Henry Lewis and John Hambleton, inhabitants.
- *46-50. 11:11-12, Mar. 1, 1778, five inhabitants.
- *51. 11:86, Mar. 15, 1778, Edward Grissel, inhabitant.
- *52-57. 11:142-143, Mar. 25, 1778, six inhabitants.
- *58. 11:202, Apr. 3, 1778, William Morgan, inhabitant.
- *59-60. 11:253, Apr. 13, 1778, Philip Culp and John Broom, inhabitants.
- *61. 11:254, Apr. 13, 1778, John Evans, inhabitant.
- *62. 12:71, June 3, 1778, John Shay, an inhabitant.
- *63. 12:299, Aug. 8, 1778, Anthony Matica, inhabitant.
- *64. 12:299, Aug. 8, 1778, William Cole, suspicion of being a spy.
- 65-66. 13:54, Oct. 10, 1778, two civilians for counterfeiting and strong suspicion of spying.
- *67. 15:363, July 4, 1779, Isaac Depue, aiding the enemy.
- *68-70. 15:364, July 4, 1779, John King, aiding the enemy; Joseph Pettys and Stephen Smith, spies.
- *71. 15:407, July 11, 1779, John Springer, a spy (also tried for advising desertion).
- *72-74. 19:23, June 18, 1780, three spies.
- *75-77. 19:221, July 20, 1780, three civilians tried on suspicion of being spies.
- *78. 19:252, July 26, 1780, Robert Thomas John Richards, spy.

APPENDIX B

Instances of Civilians Tried by American Courts-Martial, 1793-1798

Below are listed all of the instances that we have found of civilians tried by American courts-martial during the 1790s, arranged chronologically, and showing the date and headquarters of the order announcing the result of trial, the name and character of the accused, the charge, the findings, and the sentence. Where no action by the convening authority is noted, the sentence adjudged by the court-martial was approved and ordered into execution.

An asterisk preceding the cases indicates doubt concerning the accused's civilian status; see *supra*, pp. 28 and 41-43.

A. *Wayne Orderly Books*

All of the entries in the Orderly Books of Major Gen. Anthony Wayne, except for the period Nov. 17, 1792 to April 11, 1793, have been printed in 34 Mich. Pion. & Hist. Coll. 341. The balance are in MS. at the Historical Society of Pennsylvania in Philadelphia.

In the references that follow, page numbers refer to the printed portions, "MS." to those still unprinted.

I. "Saml. Wilson a carpenter in the employment of the United States"; II. Q. Legion Ville, [Pa.] Jan. 19, 1793 (MS.).

Charge: "For purchasing spirituous Liquors and for supplying the soldiers of the United States Contrary to general orders."

Findings: Guilty.

Sentence: "to be drummed out of the Cantonment from the Grand Parade, with two bottles of whiskey Suspended about his Neck." (See, XIII, Art. 23, cited.)

2. "George Ludwell a sutler"; H.Q. Green Ville, July 25, 1794 (p. 535).

Charge: "bringing or being concerned in bringing Whiskey into Camp contrary to the General Orders of the 26th of February last and for disposing of whiskey to soldiers."

Findings: Guilty.

Sentence: "to receive one hundred lashes & be drummed out of Camp."

3. "Solomon Brewer a Trader"; H.Q. Green Ville, July 25, 1794 (p. 535).

Charge: "Keeping a disorderly store and suffering soldiers in at a late Hour of the Night of the 21st Inst. Disposing of Spirituous Liquors, in Breach of Gen'l Orders, and Playing at Cards with Soldiers."

Findings: "Guilty of every part of the charge, but selling of Liquors."

Sentence: "to be Drummed out of Camp with a Dirty Pack of Cards about his neck."

4. "Joseph Robinson a Trader"; H.Q. Green Ville, July 25, 1794 (p. 536).

Charge: "extortion & Imposition in his dealings with the soldiery."

Findings: "acquitted for want of evidence."

5. "Philip Reily a soldier, and Samuel Farewell a sutler"; H.Q. Green Ville, July 25, 1794 (p. 536).

Charge: "Gambling, Cheating and Defrauding Serjeant Healey out of Ninety five Dollars, his Property."

Findings: Guilty as to both.

Sentence: "One hundred lashes each; That Farewells property be seized, and he remain in Custody until he refunds the sum of Ninety five Dollars to Serjeant Healey, and that the said Farewell be Drummed (out of Camp) round the Cantonment in front of the Huttts of the soldiery,

from the Grand Parade, with the following label on his forehead—The just reward of Cheating and Gambling, and a Pack of Cards suspended about the Neck—The Court also sentence that in case Farewell's property should be insufficient to reimburse the above Sum; That the Deficiency be made up to Serjeant Healey out of the Pay of Reily, to be stopped for that Purpose."

Action: Confirmed, "except reimbursing Serjeant Healy who ought to be punished as a Gambler."

6. "Robert Bowles in the employ of the Contractor"; H. Q. Miami Villages, Sept. 24, 1794 (p. 555).

Charge: Not shown.

Sentence: "to ask Pardon of Mr. Sloane, in Presence of the Men now employed by the Contractor on this Ground."

*7-11. "William Glinn, William Coyle, Sam'l Blue, William Crocker, and John Fricker, Armourers, in the Employ of the United States": H.Q. Green Ville, Jan. 31, 1795 (p. 583).

Charge: "stealing a Kegg of Whiskey, and Secreting it in their Quarters."

Findings: Guilty.

Sentence: "under Article 5th of the 18th Section of the Rules and Articles of War, Sentence each of them to Receive 100 Lashes & have their Rations of Whiskey stopped, until a reimbursement of 1 1/2 Gallon be made to the Q'r Master."

Action: "Orders that the corporal Punishment take Place accordingly, upon the Grand Parade, at 10 OClock Tomorrow Morning, after the Manoeuvring the Guards, in the most exemplary Manner—when the Prisoners are to return to their Work, in the Artificers Yard & Shop—"

*12-15. "George Flanks, Charles Munroe, Stephen Ogden and John Small, Artificers, in the Employ of the Quarter Master General": H.Q. Green Ville, Jan. 31, 1795 (p. 584).

Charge: "stealing & secreting Whiskey."

Findings: Guilty.

Sentence: "under Article 5th of Section 18th of the Rules and Articles of War, sentence each of them to pay for 2 1/2 gallons of whiskey, and to receive 100 Lashes."

Action: Action in cases 7-11 covered these cases also.

16-17. "Isaac Vanhist and Nathaniel Reader, Sutlers"; H.Q., Green Ville, Feb. 23, 1795 (p. 586).

Charge: "selling spirituous Liquors, to a soldier [or] Soldier of the Legion, contrary to a General Order" [of the 24th of January and the 6th of July 1794].

Findings: Guilty.

Sentence: "The Court * * * are of Opinion, they ought to be ordered out of the Cantonment, without the Liberty of returning to it at any time hereafter, in the Capacity of Sutlers."

Action: "Orders that the said Isaac Vanhurst [and] Nathaniel Read * * * depart from the Cantonment immediately and never to return to it again in the capacity or Capacities of Sutlers on pain of Corporal Punishment."

18-19. "William Shannon a Sutler, and Matthew Gill, late a soldier in Captain Veters's Company"; H.Q., Green Ville, Feb. 23, 1795 (p. 586).

Charge: "Disobedience of Genl. Orders, Prohibiting the Sale of Whiskey, or other Spirits, and with attempting to Defraud Andrew Derring a Discharged Soldier of Twenty Dollars in charging an exorbitant Price for Goods contrary to a General Order regulating Prices—"

Findings: Guilty.

Sentence: "they are of opinion that Shannon ought to be compelled to leave the Cantonment immediately, and never be permitted to return to it again, in the Capacity of a sutler—the Court also Sentence Matthew Gill to receive 100 Lashes, and to be Drummed out of the Cantonment."

Action: As to Shannon, same as in cases 16-17; "and also orders that Matthew Gill receive the Corporal Punishment to which he is sentenced * * * and then be Drummed out of the Cantonment."

20-22. "William Irvin, Peter Walton, and Edward Gordon" [not otherwise described]; H.Q., Green Ville, Feb. 24, 1795 (p. 587).

Charge: "having in their Possession three Horses, the Property of the United States."

Findings: "Guilty of having three Publick Horses in their possession."

Sentence: "The Court * * * are of opinion they ought to lose the Money, they have Paid for the said Horses, which will be a Punishment Adequate to their Guilt."

23. "Patrick Hanabury an Artificer"; H.Q., Green Ville, May 20, 1795 (p. 612).

Charge: "repeated Drunkenness and Neglect of Duty."

Sentence: "under the 23rd Article of the 13th Section & 5th Article of the 10th [18th] Section of the Rules and Articles of War, to receive fifty lashes."

24. "William Haverland, a Sutler"; H.Q., Green Ville, June 10, 1795 (p. 618).

Charge: "Selling Liquor to a soldier on the 5th Instant, in Violation of General Orders, Prohibiting the same, on a forged permission."

Findings: Guilty.

Sentence: "under the 23rd Article of the 13th Section of the Rules and Articles of War, to be Drummed out of the Cantonment with Two Canteens or Bottles suspended about his Neck; and thence to and along in front of the Guards on the Grand Parade, and out of the Camp; and never to return in any Capacity, on Penalty of receiving such immediate Punishment as may be inflicted upon him."

25. "Samuel Shepherd a Pack Horse Man"; H.Q., Green Ville, July 5, 1795 (p. 626).

Charge: "Stealing a Publick Horse, and Bells Off Publick Oxen."

Findings: Guilty.

Sentence: "under the 23rd Article of the 13th Section, and the 5th Article of the 18th Section, of the Rules and Articles of War, to receive One hundred lashes, and to be drummed round the Cantonment, and thence out of Camp with six bells suspended about his Neck."

26-28. "Robert Mooney, Adam McKee, and Peter Griffin" [not otherwise described]; H.Q., Green Ville, July 5, 1795 (p. 627).

Charge: "stealing Bells off Publick Oxen."

Findings: "Acquitted by the Court for want of Evidence."

Action: "are to be immediately liberated."

29. "John Johnston, a Pack Horse Master"; H.Q., Green Ville, Sept. 15, 1795 (p. 644).

Charge: Neglect of duty in making unnecessary Delays, and in attention to the safe keeping, and Preservation of the Publick Horses, under his direction, from the 27th of August to the 9th of September on a Command to Fort Wayne, and back again; so that out of One hundred & eighty five Horses, committed to his charge; only One hundred & Thirty have been returned—Fifty five of them having been lost thro' his Neglect."

Findings: "Guilty of [Neglect of] Duty, in not obliging the Men under his Command, to do their Duty, by reason whereof sundry Pack Horses in his Charge were lost."

Sentence: "under the 23d Article of the 13th Section and the 5th Article of the 18th Section, of the Rules & Articles of War; to be Dismissed the service of the United States, & to forfeit three Months Pay, to compensate the United States, for the loss sustained by his Neglect."

Action: "Orders * * * that John Johnston be confined in the Provost Guard until he refund to the Acting Quarter Master General, Three Months Pay, agreeably to his Sentence."

30. H.Q. Greenville, Feb. 29, 1796 (p. 680).¹

"Peter Minard the Deserter & Betts the Whiskey Smugler will be drummed out of Camp tomorrow after the Guards are mounted * * * The Commissary is to furnish three Days full Provision to each."

*B. Orderly Books of the Corps of Artillerists
and Engineers*

Four volumes entitled as above are in the Library of the United States Military Academy at West Point, N. Y. The entries run from May 7, 1795, to May 19, 1799; the last entry is on a separate slip that is pasted into the book but not copied.

30A. " * * * a woman by name Polly Toomy"; General Order, July 31, 1795 (1 *Orderly Book of the Corps of Artillerists and Engineers* 73).

No trial. Offense was that after having been drummed out of the Garrison three times, "the last being yesterday evening she has again returned the same night in defiance of the Garrison orders."

Ordered by the Commandant, Major Tousard, that "the said Polly Toomy shall be drummed out again and receive twenty lashes on her bare back * * *"

For the complete text of the order, see p. 60 of the *Singleton* brief in No. 22.

31. "Jacob Neilson Sutler belonging to this Garrison"; Oct. 7, 1795, vol. I, pp. 159-162.

Charge: "selling Liquors to the Garrison Soldiers contrary to orders."²

¹ Entry while Brig. Gen. Wilkinson was temporarily commanding in Maj. Gen. Wayne's absence; see Gen. Wayne's farewell, Dec. 14, 1795 (p. 659), and Gen. Wilkinson's assumption of command, Dec. 16 (p. 660).

² See p. 46, *supra*, for a partial text of the orders.

Findings: Guilty.

Sentence: "to pay a fine of Fifty Dollars to the United States, and do further direct that the Store from which he sold Liquor contrary to orders, be closed immediately."

Action: "Considering however the Case of Jacob Neilson, he remits to him the half of the Fine and orders the said Neilson to be kept under guard until the other half is paid into the Hands of the Paymaster, and suspends the second part of the Sentence until the first breach against the orders issued to Sutlers the 26th Sept. 1795. J.J.U. Rivardi, Comdt. pro tem."

C. Wilkinson Order Book

The Wilkinson Order Book is a bound MS. volume containing 767 legibly numbered pages. It is in the Early Wars Section, War Records Division, National Archives; the entries therein run from Dec. 31, 1796, until April 23, 1808.

32. "William Mitchell Suttler": H.Q. DEtroit, July 20, 1797 (pp. 57-60).

Charge: "violation of the General Order of the 12 Instant, in selling liquor without permission to a soldier."

Findings: Guilty.

Sentence: "under the General Order of the 12th Instant, and the 23d Article of the 13 section of the rules and articles

This order (p. 48) was as follows:

"The desertion of the Troops may be ascribed chiefly, to the scene of drunkenness produced by the unashamed Sales of liquor, which have been permitted, and to the seductive acts of persons indisposed to the Government of the United States.

"To remedy evils replete with consequences to the National Interests and so subversive of subordination and discipline. All persons are hereby prohibited selling liquor of any kind to the Troops, except under the written permission of Lieut. Colonel Commandant Strong—the infraction of this order by whosoever committed, shall be punished by the guard House, and the sentence of a General Court Martial.

"Any person attempting to inveigle a soldier from his duty, or in advising him to desert shall receive Fifty lashes, and be drummed out of the fortifications."

of War, to be drummed with a bottle suspended about his neck, with the *rouges* March (together with Lydia Conner a prisoner convicted of the like Offense, his left hand tied to her right) through the Citadel, in front of the Troops paraded; thence through the Streets of the Town, thence to and around the front of the barracks of the Soldiery in Fort Lernault, thence out of the Fort to and along the main Street, and out of the West or South West Gate of the town, not to return therein; to be forever prohibited from acting in the capacity of a trader or sutler within the lines or fortifications of the Troops of the United States, on penalty of receiving such punishment as may be inflicted upon him, by the sentence of a Court Martial."

Action: "However highly merited, he [i.e., Gen. Wilkinson] remits so much of the Sentence passed upon Mitchel, as relate to drumming, and he flatters himself that this instance of his clemency, may not be misapprehended, as no further indulgence must be expected."

33. "Lydia Conner a follower of the Army": H.Q. DETROIT, July 20, 1797 (pp. 58-60).

Charge: "Violation of the General Order of the 12th Instant."

Findings: Guilty.

Sentence: Same as Mitchel's, "her right hand to be tied to his left"; see pp. 62-63 of the *Singleton* brief in No. 22 for the exact text.

Action: "The Sentence passed upon Lydia Conner, a notorious Offender, is to be carried into execution at 6 O'Clock, this afternoon."

34. "James Fraser a Merchant of D'Etroit": H.Q. DETROIT, July 20, 1797 (pp. 59-60).

Charge: "Violation of the General Order of the 12th Instant."

Findings: Guilty.

Sentence: "but as there is a possibility (from the words *ardent Spirits* being included in the proclamation, and not in the General Order) that he might have misconceived the latitude of the order, they only sentence him, under the General Order of the 12th Instant, and the 23d Article of the 13 Section of the rules and articles of War, to be reprimanded by the Commander in Chief in such manner as he may think proper."

Action: "With respect to Mr. Fraser, the Commander in Chief will observe, that as he can never be indifferent to the feelings of any person: Should the transgression have originated in Misapprehension, he regrets the Occasion, otherwise he hopes the process may be received as an evidence of the impartiality of the administration and of the lenity of the Court, and that it will have the effect to prevent a repetition of the Offence, which cannot be permitted or pardoned."

35. "Mathew McFall" [not otherwise described]; H.Q., D'Etroit, July 28, 1797. (pp. 66-67).

Charge: "enticing and endeavouring to persuade Jeremiah Hyland a soldier in the Service of the United States to desert therefrom."

Findings: Guilty.

Sentence: "under the 23d Article of the 13 Section of the rules and articles of War, and the General Order of the 12 Instant to receive Fifty lashes, to be inflicted with wire cats, to have the left side of his head and his right Eyebrow close shaved, to be drummed with a rope about his Neck, his head uncovered, through the citadel and Fort Lernault, then through the streets and out of the Town, and not to return within the lines or fortifications, on penalty of receiving such punishment as may be inflicted upon him."

36. "John McKergan" [not otherwise described]; H.Q., D'Etroit, July 28, 1797 (pp. 66-67).

Charge: "violation of the General Order of the 12th Inst. in selling liquor to the soldiery."

Sentence: "under the 23 Article of the 13 Section of the rules and articles of war, and the General order of the 12th Instant, only, to be expelled the lines and fortifications of the place (in consequence of his age, infirmity, and the character of him) and not to return therein on penalty of such punishment as may be inflicted upon him."

37. "Robert Kean a sutler": H.Q. D'Etoit, Sept. 11, 1797 (p. 79).

Charge: "selling Liquor to soldiers without permission."

Findings: Acquitted.

38. "John Blackburn a follower of the Army," tried by garrison court-martial; H.Q. Pittsburgh, April 3, 1798 (p. 108).

Charge: "disobedience of orders in bringing whiskey into the Garrison."

Findings: Guilty.

Sentence: "to receive twenty five lashes on the bare back but in consideration of his Age and infirmity recommended by the Court to the mercy of the Commander in Chief."

Action: "The Commander in Chief approves the foregoing sentences * * * but in Consideration of the Recommendation of the Court he remits the punishment to which Blackburn and * * * were sentenced."

39. "Mathias Augustine a Subject of His Catholic Majesty's" [not otherwise described]; H.Q. Loftus's Heights [Miss. Terr.], Nov. 19, 1798 (pp. 168-169).

Charge: "selling spirits to the troops without permission."
Plead guilty.

Sentence: "to receive one hundred lashes, & to be drummed out of Camp with two bottles suspended by his neck."

Action: "It appears that the prisoner offers the Plea of Ignorance in extenuation of his confessed guilt,—yet it is set forth explicitly by the testimony offered on his trial

that his sales were made in a clandestine manner and that he has been guilty of falsehood in alledging to the Court the liquor sold was laid in for the consumption of his crew. —such strong evidence of conscious misconduct in the first instance and turpitude in the last, leave no doubts in the General's mind of the motives & the merits of the prisoner. He therefore approves of the sentence of the Court, but in Consideration of the amicable connexion subsisting between his Majesty of Spain and the United States of America in regard to the clemency due to a foreigner as a testimonial of the respect in which we hold a Sovereign power, and as a manifestation of our disposition to cultivate that harmony which is reciprocally interesting to the two nations the General thinks proper to remit the punishment and orders the prisoner with his property to be dismissed the verge of the Camp."

APPENDIX C

**Full Text of the 1877 Opinions of the Judge Advocate
General of the Army Holding Peacetime Trials of
Civilians by Court-Martial to Be Unconstitutional**

The originals of the following opinions of The Judge Advocate General of the Army appear in 38 Bureau of Military Justice—Letters Sent 557 and 641 (MS., Nat. Arch.), and resulted in the opinions of the Attorney General that were published in 16 Op. Atty. Gen. 13 and 48.

We have reprinted the texts which follow from pp. 86-99 of the Reply Brief for Appellant and Petitioner on Rehearing, Nos. 701 & 713, Oct. T. 1955.

WAR DEPARTMENT,
BUREAU OF MILITARY JUSTICE,

April 16, 1877.

HON. GEO. W. McCrARY,
Secretary of War.

SIR: I have the honor to return herewith the accompanying papers, referred to me from your Office, "for remarks," and to submit thereon as follows:

1. These papers relate—*first*—to the question of the amenability to military jurisdiction and trial by court martial of *Superintendents of National Cemeteries*. This question, having been brought up by the Quartermaster General, and referred to this Bureau, I had the honor to recommend, by the within endorsement of November 27th last, that the question be submitted to the Attorney General for opinion, and it was submitted accordingly on Dec. 6th last. I had indeed no doubt myself on the question, nor had my predecessor, Judge Advocate General Holt, who, on Oct. 1873, had given an official opinion to the effect that, in view of the fact that Superintendents of Cemeteries were no part of the army, but civilians, being indeed required to be civilians by positive statute—R. S., Sec. 4874 the only law on the

subject* to hold them amenable to the military jurisdiction in time of peace involved an absurdity. This is certainly my own view; it being further my opinion that the 63d Article of War† refers to, and is operative only in, (as the terms "camp" and "in the field" indicate,) a time of war, i. e., war with a foreign power, or with Indians, or a civil war; and can have no application in time of peace. Sundry other of the Articles of War are applicable only to time of war; and, as to this, or any other, Article or Statute, even if it did *in express terms* assume to extend the military jurisdiction to civilians in time of peace, it would, in my opinion, necessarily be unconstitutional and of no legal effect. In my view, no possible case can arise, in time of peace, where a civilian can legally be made liable to military arrest and trial for a criminal or other offence, and any statute which attempts to render him so amenable must necessarily be wholly void. In time of *war* civilians serving with troops engaged in hostile operations, become, for offences committed upon the theatre of war, amenable under the 63d Article above cited, and indeed independently of it, to the Military jurisdiction. So, during the prevalence of Martial law or Military government, (See Opinion of Chase, C. J., in *In re Milligan*, 4 Wall. 142,) civilians may be made so amenable in particular cases; though here the exceptional jurisdiction can properly be enforced only with great delicacy and caution. But except in these instances, such a jurisdiction cannot be exercised without, in my judgment, the clearest violation of the Constitution; and to exercise it in fact would be an act of arbitrary power wholly repugnant to the principles upon which our system of government is based.

* "The Superintendent of the national cemeteries shall be selected from meritorious and trustworthy soldiers, either commissioned or enlisted men of the volunteer or regular Army, *who have been honorably mustered out or discharged from the service of the United States*, and who may have been disabled for active field service in the line of duty."

† "All retainers to the camp, and all persons serving with the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders according to the rules and discipline of war."

So obvious to my mind is all this, that, (in view of the terms of Sec. 4874 of the Revised Statutes; in regard to Superintendents of National Cemeteries,) I should never have thought of recommending the reference of the question of their amenability to military trial, to the Attorney General, had it not been for the recent opinion (contained with the accompanying papers) of that official in, (or rather relating to, for the opinion was in terms general,) the case of *Barth*, to which the other papers, herewith returned, refer. It was the existence of this opinion alone that induced such recommendation, and it is the fact alone that it still exists which induces the request with which this communication concludes.

2. *Chas. H. Barth* was a quartermaster's clerk, employed by Lieut. Col. A. R. Eddy, Depty. Quartermaster General, and chief quartermaster of the military Department of California, stationed at San Francisco. Barth was not an officer of the army nor an enlisted man, but a civilian clerk paid out of the annual appropriation for the quartermasters department of the Army. Employed at San Francisco, in time of peace, his *status* was precisely that of any civilian clerk employed at the present time in the War Department at Washington; his only relation to the military service being that he performed labor for the United States in the military branch of the executive department of the government. Barth, having been detected in the forgery of the name of a civilian contractor on checks issued to his order by the United States, through Lieut. Col. Eddy, and in the utterance of these checks when forged, by selling them to a money broker in San Francisco and getting the money upon them, (as also of the falsification of official papers in violation of Sec. 5438, Rev. Stats.,) was (illegally as I hold,) placed in *military arrest* by the order of the Department Commander, General Schofield, and the question was thereupon raised by him whether Barth could legally be tried by a court martial. This Bureau gave its opinion unhesitatingly in the negative, but General Schofield, who took a contrary view, having induced the question to be referred by the Secretary of War to Attorney General Taft, that official, on June 2, 1876, rendered a very brief opinion in which he concurred in the view of Genl. Schofield. This opinion, which in effect held all the clerks—male and female

of the War Department subject to the military jurisdiction and to trial by court martial, and the principle of which was indeed to hold the Secretary of War, whose relation to the "land forces" is of the most intimate character, as also the President who is commander in chief of the Army, similarly amenable, appeared to me so extraordinary, that, believing it to have been issued through some oversight, I informally requested the Attorney General to reconsider the question passed upon. This he readily consented to do, and—as I have been informed—had done so in part, when he went out of office. His opinion, therefore, of June 2, 1876, remains unrevoked.

[It may be noted here that Barth escaped from the military arrest, and has since been at large. The State Department has recently been requested by the Secretary of War to procure his extradition from the Hawaiian government.]

3. In view of the facts thus detailed, I have the honor to request, and, in view of the importance of the question of constitutional law involved, to urge, that the Secretary of War will renew the reference to the Department of Justice of the question of the amenability to the military jurisdiction of Superintendents of National Cemeteries, originally submitted by the Hon. Secretary to the Attorney General on Dec. 6th last, but on which no opinion has yet been given: And further that he will request at the same time a review of the opinion relating to the case of Barth, and a further opinion therein, in case it should be deemed proper to withdraw the existing one.

By a reference to Secretary Cameron's said communication to the Attorney General of Dec. 6, 1876, it will be seen that he requested in substance that the two cases should be considered together, and an opinion be furnished upon both, in connection and at the same time.

A brief memorandum of authorities upon the question of jurisdiction above indicated is herewith furnished; as also Remarks upon the Argument of Genl. Schofield in the case of Barth.

I have the honor to remain

Very respectfully

Your obt. svt.,

W. M. DUNN.

Judge Advocate General.

MEMO. OF AUTHORITIES

"Under the Constitution of the U. S., (See Amendments—Arts. V & XI), Congress has no power to subject any citizen of a state to trial and punishment by military power in time of peace." Atty. Gen. Hoar, XIII Opinions of Attys. Gen. 63.

In XIV. Opinions, 22-24, Atty. Gen. Williams construes the 63d (then numbered the 60th) Article of War as referring to a time and theatre of war, and holds civil employees serving with the troops in an Indian war, amenable to the military jurisdiction, under this Article. The inference is that employees not so serving, (but serving in time of general peace, and—even if Indian hostilities were going on at the time—at a place not in the "field" but wholly remote from the theatre of any hostilities,) cannot legally be made so amenable.

In *Stuart v. United States*, 18 Wallace, 84, 88, it is held that a contractor for transportation of military stores from post to post "remote from the seat of actual war," was not performing a military service, and was no part of the Army. (And see reference to this case in 10 Ct. of Claims, 419.)

The only adjudicated case known to me in which the jurisdiction of a military court over a civilian clerk or employee is sustained, is that of *Matter of John Thomas*, U. S. Dist. Ct., for the Southern Dist. of Mississippi, 1 Chicago Legal News, 245. Thomas was a clerk to an Army paymaster. I think, of course that the ruling holding him amenable to trial by court martial was entirely unsound, but I believe that it was in a considerable degree influenced by the fact, that Mississippi was at the time under a military government, under the Reconstruction Laws, and the party was viewed thus—erroneously as I think—as practically serving in the field.

* [The ruling in *U. S. v. Bogart*, 3 Benedict, 257, proceeded on the view that a paymaster's clerk in the Navy was a regular uniformed officer of the Navy, having rank as such, &c., and thus not a civilian at all. This case is therefore not in point.]*

* If it be held that Barth is or was amenable to military jurisdiction and trial, then every clerk in the War Department at Washing-

In General Schofield's argument he refers to the phraseology of the present 60th Article of War—"any person in the Military service of the United States," as if it extended the military jurisdiction to persons other than officers and enlisted men. In my opinion, this phrase is simply to be regarded as a condensed form of expression for the phrase employed in the original Act, (Mch. 2, 1863, ch. 67, sec 1.)—"any person in the land (or naval) forces of the United States, or in the militia in actual service of the United States in time of war." By these words Congress clearly intended the officers and soldiers of the army (including militia when regularly called into the United States service,) and the officers and seamen of the navy. The Commission on the revision of the Statutes were not authorized to change the existing law, but they could condense and simplify, and, in my opinion, this is all that they have done in the present 60th Article; the term now employed being merely a brief form of the more elaborate form, but each being simply a description of the purely military force of the United States, composed of officers and enlisted men. A similar condensation of expression occurs in the corresponding Article of the Naval Code.

I am—further—wholly unable to perceive the bearing upon the present question, of the "or other person," etc., cited by General Schofield from the clause before the last of the 60th Article. I construe this as making punishable officers or soldiers who may purchase, etc., the articles mentioned from other officers or soldiers, or from any of the class of civil persons commonly employed in connection with armies, as teamsters, officers servants, camp-followers, etc. I consider the provision to have no more significance in reference to the question at issue than if, instead of the expression, "or other person," etc., the Article had said—*or from any civilian*. To illustrate: Suppose an Act of Congress should provide that if a soldier committed an assault

ton, male or female, is so amenable: the same may also be, with equal reason, held of the Secretary of War, whose relations to the land forces are closer than can be those of any clerk in Quartermaster or any other branch of his Department; and may be held also of the President who is commander in chief of the Army!

upon a citizen of the United States, he should be tried by court martial, and punished in a certain way. In my opinion there would be just as much reason for holding that under this Act the citizen could be tried by court martial and punished as prescribed for committing an assault upon the soldier, as for holding that the clause indicated of the 60th Article furnishes any color of authority for the trial by court martial of a civilian clerk situated as was Barth.

I cannot therefore perceive that the Revised Statutes makes any change whatever in the law as to the particular under consideration. But even if they did; even if in a hundred Articles or provisions they in terms authorized the trial of civilians by court martial, such a trial would still be utterly illegal because in contravention of the letter and spirit of the Constitution. The question is thus a constitutional not a statutory one. At the same time I am unable to discover in the Statutes any attempt whatever to contravene the Constitution in this respect.

W. M. DUNN,
Judge Advocate General.

WAR DEPARTMENT,
BUREAU OF MILITARY JUSTICE,

June 16, 1877.

HON. GEO. W. MCCRARY,
Secretary of War.

SIR: I have the honor to return herewith the papers referred to this Bureau in the case of Wm. G. Crafts, and to express the opinion that such case is not within the jurisdiction of a court martial, and that the prisoner is entitled to be immediately released by the military authorities, or committed to the custody of the U. S. Marshal.

This Bureau has always been of opinion that the military jurisdiction cannot legally be extended to a case of a civilian except upon the rare and extraordinary occasion of a state of war or of the existence of martial law, and then only for crimes committed upon the theatre of war or within the scope of such law. The 63d Article of War is deemed to

recognize this principle, in providing that retainers to the *Camp* and persons serving with the *armies in the field*, though not enlisted soldiers, shall be subject to military law; thus evidently limiting such amenability to civil persons serving with troops engaged in actual war, and for offences committed upon its theatre.

The within named civilian, Wm. G. Crafts, was, at the time of his offences, not serving with an army in the field, but was a clerk to an officer acting as quartermaster stationed at a military post, within the limits, not of a Territory but of a State—Nebraska. This post is designated "Camp Robinson," but it is not a camp in a warlike sense, but a permanent station, having been established for at least three years. The locality of the post was not within the theatre of an Indian war; nor were the troops at or near the post engaged in war. The Indians at Red Cloud Agency, near by, were not at war with the United States.

The statement in the papers relied upon as giving the court martial jurisdiction is that—"the troops stationed at that post were "operating in the field" in the immediate presence of various bands of "Indians, many of whom were lately from the war path." This statement is a mixture of inference with fact. While it is no doubt true that some of the Indians at the Agency had recently been in hostility with the United States, it is a conclusion only of the writer that the troops stationed at the post were "operating in the field." But if indeed "operating," in the restricted sense of guarding the frontier and holding themselves in readiness to repel any disorder at the Agency, or to march against inimical Indians in the event of war or active hostilities, they were not, in the opinion of this Bureau, so engaged in actual warfare as to authorize courts martial convened at their station to take cognizance of offences committed by civilians there commorant.

It is to be remarked that not only is the right of a civilian to be tried by the civil courts one which cannot constitutionally be infringed upon except under circumstances most clearly and indubitably subjecting him to military law and government, but the theatre of an Indian war is necessarily peculiarly limited, being confined to the locality of the particular tribe or tribes at war with the United States. The

military jurisdiction in a case like the present, is thus to be more cautiously extended than in the case of a general war.

It is further to be observed that even if the jurisdiction of a court martial could legally have been stretched so as to include this case at the date of the alleged offences, March 31, it would be too late to exercise such a jurisdiction now when hostilities with Indians within the Department of the Platte have almost ceased, and a state of war can scarcely be said to exist there except so far as relates to certain distant roving bands. The jurisdiction of a court martial under the 63d Article can, it is held, be exercised only pending the war, during and upon the scene of which the offence was committed.

It is thus the opinion of this Bureau that no sufficient authority is shown for subjecting the civilian named to the exceptional jurisdiction of a military court. His offences—conspiring with contractors, &c, to defraud the United States—were not military ones, but such as are clearly cognizable, under Sec. 5438, Revised Statutes, by the U. S. District Court, which meets at Omaha, (the entire State of Nebraska being included within the judicial district,) on October 10th next. The recommendation of this Bureau would therefore be that the papers in the case be transmitted to the Department of Justice, with the request that the necessary instructions be given for the arrest of the prisoner by the Marshal and his prosecution before said Court.

In view however of the opinion of Attorney General Taft in the case of Barth, of June 2d, 1876, which the Judge Advocate General, believing it to have been inadvertently issued, has heretofore desired the Secretary of War to ask to have reconsidered, it is urged that the Hon. Attorney General be requested to furnish the Secretary of War with an opinion as to whether a court martial may legally assume jurisdiction of the case of the within named civilian clerk; Wm. G. Crafts.

W. M. Duxs,
Judge Advocate General.

APPENDIX D

Significance of Military Trials of Civilians in the 1790's in Terms of Concepts Then Prevailing

What follows below should, logically, have been included in the text; we request that the Court treat the discussion as though contained in a Supplemental Brief filed pursuant to Rule 41(5).

1. One of the apparent mysteries of the military law of the 1790s is why, when the Articles of War then in force vested in Congress the ultimate power to approve sentences in time of peace involving death and sentences extending to the dismissal of an officer, the Commanding Generals of the time, notably Major General Anthony Wayne, ordered such sentences into execution immediately, without any reference whatever to Congress. See 72 Harv. L. Rev. 15.

2. AW 2 of 1786 provided, in pertinent part—

* * * * neither shall any sentence of a general court-martial in time of peace, extending to the loss of life, the dismissal of a commissioned officer, or which shall either in time of peace or war respect a general officer, be carried into execution, until after the whole proceedings shall have been transmitted to the secretary at war, to be laid before Congress for their confirmation or disapproval, and their orders on the case. * * *

3. By a whole series of acts, beginning in 1789 and extending through 1803, the Continental Articles of War—those of 1776 as amended in 1786—were made to apply to the existing army, and to certain authorized increases in the army's strength. Sec. 4 of the Act of Sept. 29, 1789, c. 25, 1 Stat. 95, 96; Sec. 13 of the Act of Apr. 30, 1790, c. 10, 1 Stat. 119, 121; Secs. 3 and 10 of the Act of Mar. 3, 1791, c. 28, 1 Stat. 222, 223; Sec. 11 of the Act of Mar. 5, 1792, c. 9, 1 Stat. 241, 242; Sec. 4 of the Act of May 9, 1794, c. 24, 1 Stat. 366; Sec. 14 of the Act of Mar. 3, 1795, c. 44,

1 Stat. 430, 432; and see Winthrop *14 (p. 23 and note 43 of the 1920 reprint) for further enactments from 1796 to 1803. On three of the occasions specifically cited, the existing Articles were reenacted "so far as the same are applicable to the constitution of the United States" (*supra*, p. 53).

4. Not until 1796 did the Congress vest in the President the power to act on death and dismissal cases in time of peace, and on general officer cases at all times. Sec. 18 of the Act of May 30, 1796, c. 39, 1 Stat. 483, 485.

5. Yet General Wayne regularly confirmed and ordered executed numerous death sentences, some while still at Pittsburgh in 1792 (e.g., the case of Sgt. Trotter, *supra* p. 50, at note 10), and similarly confirmed the dismissal of numerous officers. E.g., Pittsburgh, July 30, 1792, 34 Mich. Pion. & Hist. Coll. 354; Hobson's Choice, Sept. 10, 1793, *id.* at 475-476; Green Ville, May 6, 1795, *id.* at 608; Green Ville, Nov. 28, 1795; *id.* at 654-657.

6. The foregoing actions were not surreptitiously taken. Writing from Pittsburgh in September 1792, General Wayne advised the War Department of the execution of three death sentences. Secretary Knox replied, "The sentences of the Courts Martial you have confirmed, seemed absolutely necessary—Hereafter it is to be hoped there may be less call for the punishment of death." 1 Knopf, ed., *Campaign into the Wilderness: The Wayne-Knox-Pickering-McHenry Correspondence*, 81, 88, 90. The Secretary frowns at the necessity; he does not question the legality.

7. It may be assumed that the Secretary of War was similarly advised of the execution of sentences to dismissal in officer cases, the effect of which was to create vacancies in the establishment to be filled by promotion or by original appointment; we have not had time to examine this aspect.

8. It cannot be supposed that Secretary Knox was unaware of the terms of AW 2 of 1786, inasmuch as he was Secretary at War under the Confederation when the amend-

ments of May 31, 1786, were adopted by the Continental Congress to replace Section XIV of the 1776 Articles of War. See 30 J. Cont. Cong. 145-146, 316-322. Nor can it be supposed that Secretary Knox tolerated irregularities in military proceedings: to the contrary.

In March 1786, when a death sentence adjudged by a court-martial had been submitted to Congress for its action (Sec. XIV, Art. 8, of 1776), Secretary Knox pointed out that the court-martial had been illegally constituted, and recommended that a court of inquiry be appointed to investigate the matter and that the officer responsible be suspended in the meantime. 30 J. Cont. Cong. 119-121.

And, in the following year, the Secretary recognized that an officer separated from the service after the demobilization of 1783 was thereafter not amenable to military trial. 30 J. Cont. Cong. 666-668.

9. What statutory authority did General Wayne have to order death sentences into execution? Why did Secretary Knox consider his actions legal? On the face of the provisions of law then in force, these were matters to be laid before Congress until 1796, at which time the power to approve death sentences in time of peace was transferred to the President. What is the answer to this tantalizing puzzle?

10. We have searched the definitive edition of the Journals for the Continental Congress for the years 1786-1789, we have thumbed volume 1 of the Statutes at Large up to the time that the confirming power was transferred to the President in May 1796, and we have similarly thumbed vol. 1, American State Papers—Military Affairs for the same period: We have found neither legislative enactment nor executive directive conferring on the commanding general the powers that were retained by the Congress in AW 2 of 1786. And we have found no discussion of the power to act on court-martial sentences to death or dismissal in the legislative history of the Act of May 30, 1796, *supra*, Section 18 of which transferred that power to the President. 5 Annals of Congress 905-913, 1418-1423, 1427-1430; 2 H. of R. J. 528, 529, 532, 566-570, 572, 573, 581, 583, 590; 2 Sen. J. 245, 248, 252, 263, 265, 267, 278.

11. Plainly, both General Wayne and Secretary Knox considered that the confirming powers exercised by the former in death and dismissal cases were legally exercised. And, on the face of AW 2 of 1786, those powers could only have been legally exercised in time of war. It must follow that both individuals believed that the period 1792 to 1796 *was* a time of war.

12. Contemporaneous documents support that view, particularly when the chronology of the time is borne in mind.

a. Indian wars had in fact been endemic for the first half of the 1790s, from the time that Harmar was defeated, through a similar defeat of his successor St. Clair, through the period of Wayne's preparation, and until Wayne's victory at Fallen Timbers in 1794 was capped by the Indians' submission at Greenville in 1795. See Spaulding, *The United States Army in War and Peace*, 118-121; Upton, *The Military Policy of the United States* (1917 ed.) 77-78, 79-80, 83; Jacobs, *The Beginning of the U. S. Army, 1783-1812*, 40-181.

b. Although the debates on the Act of May 30, 1796, *supra*, "To ascertain and fix the Military Establishment of the United States," are not particularly illuminating, and relash the hackneyed anti-militarism of the previous decade—e.g., *per* Giles of Virginia, "the very idea of a Military Establishment was to him a disagreeable thing" (5 Annals of Congress 912)—they do reflect the idea that, the Indian war having terminated, there was no more need for a War Establishment, but only for a Peace Establishment. E.g., references at 5 Annals of Congress 906, 908, 909, 913, 1418, to a "Peace Establishment"; and the following: "When the Military Establishment was raised to its present amount, it was an account of an Indian war. That war was now at an end" (909); "if that number was sufficient to carry on war, it was surely not necessary to have an equal number in peace" (910); "It was supposed that a Major General was necessary for a War Establishment, but not for a Peace Establishment" (1421-1422); "They were now upon a Peace Establishment—the last was a War Establishment" (1430).

c. A little earlier, in the House report of March 25, 1796 on "Organization of the Army," there was included a letter from Governor William Blount of the Southwest Territory to the Secretary of War, dated November 2, 1795, which remarked that "Peace now *actually* exists between the United States and the Indian tribes." 1 Am. St. Pap. Mil. Aff. 112 (italics in original).

d. In 1795, Secretary of War Pickering (who had succeeded Knox) felt that a state of war still existed.

This is evidenced by an entry in 1 *Orderly Book of the Corps of Artillerists and Engineers* (MS., U.S.M.A.) 118, 119, dated August 25, 1795, which records a death sentence ~~passed by a court-martial~~ on a deserter who pleaded guilty. Major Tousard, the Commandant, remarking that "The Commandant having maturely compared the Letter of the Secretary of War of the 7th Instant which says that since the Commencement of the Indian War, the United States have been in a situation that exclude the Idea of its being a time of peace," confirmed the sentence—but on the next day postponed its execution. 1 *id.* 120. (A month later, the culprit was pardoned by the President and restored to duty, following which Major Tousard offered an amnesty to similar offenders. 1 *id.* 138, 139.)

13. It was Maitland who "Again and again . . . emphasised the danger of imposing legal concepts of a later date on facts of an earlier date . . . We must not read either law or history backwards. We must learn to think the thoughts of a past age—the common thoughts of our forefathers about common things." Cam. ed., *Selected Historical Essays of F. W. Maitland* (1957) xi.

14. The conclusion is accordingly inescapable that, by the standards of the 1790s, the years 1792 to 1795 or 1796 were a time of war, and were so regarded by contemporaries. By the later standards of the 1870s, an Indian War on the frontier did not authorize trial by court-martial of civilians in the rear areas. 16 Op. Atty. Gen. 13; 16 *id.* 48; Appendix C, *supra*, pp. 119-127, *passim*. By the standards just pronounced at the last Term (*Lee v. Madigan*, 358 U.S. 228), the 1790s were not a time of war at Pittsburgh or West

Point. But to the men of the 1790s, those years were in their estimation a time of war throughout the nation and not merely on the actual theater of operations.

15. It follows that, in the minds of those responsible therefor, the trials of civilians by court-martial that appear in the Wayne Orderly Book (Appendix B, *supra* pp. 107-113) represented trials in time of war, and were not considered by them as having taken place in time of peace. Consequently, viewing those trials in their setting, they must be regarded as entirely similar to Washington's courts-martial of civilians during the Revolution (Appendix A, *supra*, pp. 103-105). Therefore the civilian trials of the 1790s, accurately evaluated, cannot fairly be considered as even historical precedents for the peacetime military jurisdiction now asserted by The Pentagon.

16. We request that Point III D, *supra* pp. 36-54, which was written in terms of modern concepts of war and peace, be now read in the light of the present Appendix.

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U.S. DEPARTMENT OF JUSTICE
FILED

MAY 25 1950

U.S. DEPARTMENT OF JUSTICE

No. 77

In the Supreme Court of the United States

October Term, 1950

Black, William, Petitioner

Major General John B. Bonaparte,
Comptroller, Department of Army, Respondent

ON WRIT OF HABEAS CORPUS TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

THAT THE PETITIONER

1. WAS DETAINED
2. IN VIOLATION OF
3. THE CONSTITUTION
4. AND
5. THE ACTS OF CONGRESS

THAT THE RESPONDENT
HAS
VIOLATED THE PETITIONER'S RIGHTS

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 37

BRUCE WILSON, PETITIONER

v.

MAJOR GENERAL JOHN F. BOHLENDER,
COMMANDER, FITZSIMONS ARMY HOSPITAL

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE TENTH CIRCUIT*

BRIEF FOR THE RESPONDENT¹

OPINION BELOW

The opinion of the District Court (R. 60-72) is reported at 167 F. Supp. 791.

JURISDICTION

The order of the District Court, denying the petition for a writ of habeas corpus, was entered on November 10, 1958 (R. 72). Notice of appeal to the Court of Appeals was filed on December 2, 1958, and the record was docketed in that court on December 23, 1958 (R. 73-74). The case has not been heard or decided by the Court of Appeals. Certiorari was al-

¹ On March 6, 1959, a stipulation was filed in this Court in which the parties agreed to reverse the usual briefing procedure. Accordingly, this brief for the respondent is being filed first.

lowed by this Court on February 24, 1959 (R. 75-76), 359 U.S. 906. The jurisdiction of this Court rests on 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether a United States civilian employed by the United States Army in Berlin may validly be tried by court-martial, pursuant to Article 2(11) of the Uniform Code of Military Justice, for non-capital offenses committed abroad.

2. Whether a United States civilian employee of the Army who committed offenses in Berlin, Germany, in 1956, was amenable to trial by court-martial pursuant to Article 18 of the Uniform Code of Military Justice.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following provisions of the Constitution are involved:

Article I, Section 8. The Congress shall have Power * * *

Clause 10. To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

Clause 11. To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

Clause 12. To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

* * * * *

Clause 14. To make Rules for the Government and Regulation of the land and naval Forces;

* * * * *

Clause 18. To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

* * * * *

Amendment V. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The pertinent Articles of the Uniform Code of Military Justice, Act of May 5, 1950, c. 169, Section 1, 64 Stat. 108, 109, 114, provide as follows:²

Article 2 [50 U.S.C. 552] *Persons subject to the code.* The following persons are subject to this code:

* * * * *

(11) Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of inter-

²The Uniform Code of Military Justice was enacted into positive law in Title 10 U.S.C. and became effective as such on January 1, 1957. Petitioner's trial occurred prior to that date. Accordingly, references in this case are to Title 50.

national law, all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States and without the following territories: That part of Alaska east of longitude one hundred and seventy-two degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands;

* * * * *

Article 18 [50 U.S.C. 578] *Jurisdiction of general courts-martial.* Subject to article 17, general courts-martial shall have jurisdiction to try persons subject to this code for any offense made punishable by this code and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this code, including the penalty of death when specifically authorized by this code. General courts-martial shall also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war.

STATEMENT

Petitioner, a citizen of the United States, was employed by the Department of the Army as an auditor with the Comptroller Division of the Army, Berlin Command (R. 1). On August 21, 1956, he was tried in Berlin by a duly convened general court-martial on charges of three acts of sodomy committed with military personnel (in violation of Article 125, Uniform Code of Military Justice, 50 U.S.C. 719), of two lewd and lascivious acts with persons under 16 years of age, and of showing obscene pictures to persons under 16 years of age with the intent of arousing

their sexual desires (in violation of Article 134, Uniform Code of Military Justice, 50 U.S.C. 728) (R. 6-7).

At the trial, petitioner was represented by military as well as by independent private counsel (R. 17). After having been advised of his rights by the law officer, petitioner, in open court, pleaded guilty to the charges (R. 24). On the basis of this plea, the court-martial found petitioner guilty of all charges and specifications and sentenced him to confinement at hard labor for a period of ten years (R. 39).

The convening authority approved the findings of guilty but reduced the sentence to five years' confinement (R. 8). The Board of Review affirmed the findings of guilty and the sentence as approved by the convening authority. On review in the Court of Military Appeals, the jurisdiction of petitioner's court-martial was sustained, and the court, after considering the decision of this Court in *Reid v. Covert*, 354 U.S. 1, held Article 2(11) of the Uniform Code to be constitutional as applied to the circumstances in this case. 9 U.S.C.M.A. 60, 25 C.M.R. 322 (R. 53-60).

Ultimately, petitioner was confined in the Fitzsimons Army Hospital in Denver, Colorado, where on August 20, 1958, he filed a petition for a writ of habeas corpus in the District Court for the District of Colorado. The court held that petitioner could constitutionally be tried by courts-martial pursuant to the jurisdictional provisions of Article 2(11) (R. 60-72). An appeal was taken to the Court of Ap-

peals for the Tenth Circuit; but certiorari was allowed prior to argument or decision.

SUMMARY OF ARGUMENT

I

Petitioner was tried and convicted by court-martial of having committed certain non-capital offenses while he was in Berlin as a civilian employee of the Army. Jurisdiction over petitioner was based on Article 2(11) of the Uniform Code of Military Justice. Our first position is that this Article is a proper exercise of Congressional power to make rules for the government and regulation of the military forces, under Article I, Section 8, Clause 14 of the Constitution. The arguments which sustain the constitutionality of Article 2(11) as applied here are fully set forth in our brief in *McElroy v. Guagliardo*, No. 21, this Term, which presents the same issue.

II

There is an additional jurisdictional basis for the trial of petitioner by court-martial. He was convicted by a general court-martial of offenses committed in Berlin, Germany, which is territory occupied by the Allied forces as a consequence of World War II. Under Article 18 of the Uniform Code of Military Justice, Congress has provided that persons who by the law of war are subject to trial by military tribunals shall similarly be subject to trial by general court-martial and to punishment in accordance with the laws of war. It is clear that, by virtue of its war powers, Congress can validly provide for

such trial and punishment in territory occupied as a result of war.

There is a long history in the United States of the use of military commissions as an instrument of governmental administration of occupied territories. During hostilities and subsequent occupation periods in the Mexican War, the Civil War, the Spanish-American War, and World War II, military commissions were established under the war power, and such tribunals were uniformly upheld by the federal courts.

This Court recently upheld the validity of a trial of an American citizen by a military court in West Germany during the occupation regime. *Madsen v. Kinsella*, 343 U.S. 341. The status of Berlin as an occupied area at the present time is identical with the occupied status of West Germany at the time of the trial and conviction of Mrs. Madsen, and that case accordingly is dispositive of the question here.

ARGUMENT

I.

As applied to petitioner, a civilian employee of the Army tried overseas by court-martial for non-capital offenses, Article 2(11) of the Uniform Code of Military Justice is valid under Article I, Section 8, Clause 14 of the Constitution

Petitioner Wilson, a civilian employee of the Army, was convicted by court-martial of having committed, in Berlin, a non-capital offense against the Uniform Code of Military Justice. As applied to petitioner, the constitutional validity of Article 2(11) of the Uniform Code of Military Justice, under Article 1,

Section 8, Clause 14 of the Constitution, depends on the very same factors and considerations discussed in our brief in *McElroy v. Guagliardo*, No. 21, this Term, to which the Court is respectfully referred. The judgment of the District Court denying the petition for writ of habeas corpus should be affirmed for the reasons stated in our *Guagliardo* brief.

II.

Court-martial jurisdiction over petitioner may also be sustained under the Congressional war powers

Alternatively, court-martial jurisdiction in the present case can be sustained under Article 18 of the Uniform Code of Military Justice (*supra*, p. 4) on the basis of the Congressional war powers. Those powers (upon which the District Court did not rely) are relevant here because this case arose and was tried in Berlin, which remains an occupied territory the occupants of which may be tried by court-martial under the law of war and Article 18.

A. Military trials may validly be held in territory under military occupation

In *Madsen v. Kinsella*, 343 U.S. 341, the Court was confronted with the case of a civilian dependent, wife of a member of the armed forces, whom a United States Court of the Allied High Commission in Germany convicted of murdering her husband. The offense took place in October, 1949, near Frankfurt, Germany, in what was then the United States Area

"General courts martial shall also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war."

of Control. After her incarceration in this country, Mrs. Madsen filed a petition for a writ of habeas corpus, challenging the jurisdiction of the court which convicted her, but this Court affirmed judgments of the lower courts which had rejected her contentions.*

While it was conceded by the petitioner in *Madsen* that a United States court-martial would have had jurisdiction, challenge was made to the jurisdiction of the special occupation court which tried and convicted her. In discussing the power of that tribunal, this Court laid down the ground rules for the exercise of jurisdiction in occupied territory by military courts under the war powers.⁵ The fact of occupation supplies the constitutional basis for the exercise of jurisdiction by special military courts, and, *a fortiori*, by courts-martial, over soldier and civilian alike, within the occupied territory. 343 U.S. at 348. The validity of military jurisdiction is not vitiated by the fact that there may be some form of local government, as long as it is "a government prescribed by an occupying power and * * * [dependent] upon the continu-

*In 1957, after the decisions in *Reid v. Covert*, 354 U.S. 1, had been handed down, Mrs. Madsen again petitioned for a writ of habeas corpus, relying on the *Covert* decision. This attempt was not successful. *Madsen v. Overholser*, 251 F. 2d 387 (C.A.D.C.), certiorari denied, 356 U.S. 920.

⁵With respect to the problem presented by the instant case, Congress has specifically used its war powers in the enactment of Article 18 of the Uniform Code of Military Justice, 50 U.S.C. 578 (presently 10 U.S.C. 818), *supra*, p. 4. In *Madsen*, the tribunals were established under the authority of the President. Here, Congressional war power is directly involved. These constitutional powers are discussed in *Ex parte Quirin*, 317 U.S. 1, 25-26. See also Winthrop, *Military Law and Precedents*, 831 (Reprint 1920 ed.).

ing military occupancy of the territory" (343 U.S. at 357). The authority for such military trials "does not necessarily expire upon cessation of hostilities or even, for all purposes, with a treaty of peace. It may continue long enough to permit the occupying power to discharge its responsibilities fully" (343 U.S. at 360).

In addition to the *Madsen* case, and two other recent decisions by this Court (*Ex parte Quirin*, 317 U.S. 1 (espionage); *In re Yamashita*, 327 U.S. 1 (war crimes)), which sustained the jurisdiction of military commissions as an incident of war and occupation in World War II, this Court has on other occasions upheld the jurisdiction of tribunals established by the United States under the customs and usages of the laws of war. *Leitensdorfer v. Webb*, 20 How. 176, sustained the civil jurisdiction of occupation courts set up by General Kearney in New Mexico after the Mexican War. The attack there was upon the validity of certain ordinances of the military government which provided for occupation courts with criminal and civil jurisdiction. The Court stated (20 How. at 178):

Of the validity of these ordinances of the provisional Government there is made no question with respect to the period during which the territory was held by the United States as occupying conqueror. * * * But it has been contended, that whatever may have been the rights of the occupying conqueror *as such*, these were all terminated by the termination of the belligerent attitude of the parties. * * * The fallacy of this pretension is exposed by

the fact, that the territory never was relinquished by the conqueror, * * *.

During the same period, General Scott convened military commissions for the purpose of trying offenses committed during the occupation of Mexico which were non-military in nature, "whether committed by Mexicans or other civilians in Mexico against individuals of the U.S. military forces, or by such individuals against other such individuals or against Mexicans or civilians * * *." Winthrop, *Military Law and Precedents*, 832 (Reprint 1920 ed.); Birkhimer, *Military Government and Martial Law* (3d ed., 1914), App. I, pp. 581-582 (full text of General Order No. 287 establishing the military commissions).

Military commissions were likewise used extensively during the Civil War, some having been convened as early as 1861. Winthrop, 833. This Court specifically upheld the jurisdiction of provisional courts set up by President Lincoln in Louisiana after that territory had been occupied by the Union armies. *The Grapeshot*, 9 Wall. 129, 131; see also *Burke v. Mittenberger*, 19 Wall. 519; 524; *United States v. Reiter*, 27 Fed. Cas. No. 16146 (Prov. Ct. La.). Similarly, a court established by an army department commander in New Orleans was held to be validly constituted, in *Mechanics' Bank v. Union Bank*, 22 Wall. 276, 296. The Spanish-American War offers additional precedents as to the use of tribunals constituted as an incident of military occupation. See *Neely v. Henkel* (No. 1), 180 U.S. 109, 121-123; *Santiago v. Nogueras*, 214 U.S. 260, 266; *Ex parte Ortiz*, 100 Fed. 955, 963 (C.C. Minn.).

What these decisions show is that military jurisdiction in occupied territory is one facet of the assumption of governmental powers by the occupying power. The occupation government which creates the conditions for military jurisdiction may be military, or, as it was in Germany when the *Madsen* crime took place, civilian. When such a government is established, it constitutes the supreme authority in the occupied territory (Winthrop, 800):

Military government, thus founded [on the fact of occupation], is an exercise of sovereignty, and as such dominates the country which is its theatre in all the branches of administration. Whether administered by officers of the army of the belligerent, or by civilians left in office or appointed by him for the purpose, it is the government of and for all the inhabitants, native or foreign, wholly superseding the local law and civil authority except in so far as the same may be permitted by him to subsist. * * * The local laws and ordinances may be left in force, and in general should be, subject however to their being in whole or in part suspended and others substituted in their stead—in the discretion of the governing authority.*

* Military government, the status involved in this case, should be distinguished from martial law. In general, military government involves military control of foreign territories as a consequence of war, whereas martial law concerns itself with the military control of domestic territories in which because of some dire necessity, such as an impending insurrection or rebellion, extraordinary measures need to be employed. As indicated above, military government depends only upon the fact of occupation. See Wiener, *A Practical Manual of Martial*

Local law and civil authority remain within the power and responsibility of the occupying state until that state provides a substitute or until the fact of occupation ceases to exist.

In sum, it is clear that where there is an occupation, there may be an occupation government, and, as part of such a government, there may be military courts with the power to try soldiers and civilians under the law of war. *Madsen* is but a recent,

Law 7 (1940). It should also be noted that the criminal jurisdiction of the civil courts is much less subject to be abridged under martial law than it is under military government. Winthrop, 830. See, also, *Ex parte Milligan*, 4 Wall. 2, where the Court placed great emphasis on the fact that civil courts were open. When military government is established, civil courts have no authority whatever, except insofar as they are permitted to operate by the occupying power. The military government itself assumes the judicial function or else delegates it to the courts of the occupied territory.

Civil-type offenses, such as those committed by petitioner in this case, are properly triable under the laws of war. Conduct is considered to be a crime cognizable under those laws if it is either specifically punishable under the criminal laws of the occupied state or recognized generally by civilized nations as a crime against society. *United States v. Schultz*, 1 U.S.C.M.A. 512, 4 C.M.R. 104 (homicide by negligent operation of a motor vehicle); see also, Birkhimer, *op. cit.*, 581-582; and Winthrop, 773. The practice of modern warfare has recognized the right of the occupying power to set up its own military courts and to alter local criminal law and procedure (though it should, if possible, leave in force local criminal laws and rule the people of the occupied nation through their own laws and rules of administration). 2 Oppenheim, *International Law*, §§ 169, 172 (7th ed., 1952); Spaight, *War Rights on Land*, 356 (1911); Graber, *The Development of the Law of Belligerent Occupation 1863-1914*, 110 (1949). These principles were codified in Article 64 of the Geneva Convention, T.I.A.S.

though cogent, example of the use of military courts as an incident of occupation. See the opinion of Mr. Justice Black in *Reid v. Covert*, 354 U.S. 1, 35, fn. 63.

B. Berlin continues under military occupation

As we have just shown (*supra*, pp. 8-14), petitioner's trial must be held to be valid under Article 18 of the Uniform Code if Berlin was occupied territory in 1956. Our position is that the status of West Berlin, in 1956 and today, is identical with the status of West Germany as occupied territory as of the time of the events in *Madsen v. Kinsella*. Berlin is under military occupation, both technically and realistically; our right there are rights of occupation. One need only peruse the daily newspapers to become aware of the fact, the necessity, and the reasonableness of the continuation of this status of occupation. See the *Note from the United States to the Soviet Union on Berlin, December 31, 1958* (Documents on Germany, 1944-1959, Committee Print, Senate Committee on Foreign Relations, 86th Cong., 1st Sess., p. 347), which explains our position on Berlin. In the view of the United States, the three Western powers are there as "occupying powers" and are not prepared to relinquish, on the terms of the Soviet Union, the

3365. The occupying powers have uniformly tried their own nationals in their own military courts rather than permit them to be tried in the local tribunals. See, for example, Fraenkel, *Military Occupation and the Rule of Law*, 22, 150 (1941), with respect to the practice during the Rhineland occupation after World War I.

rights they acquired through the victory in World War II.

1. This Court fully discussed the history of the occupied status of Germany in the *Madsen* case (decided in April 1952). Accordingly, it need not be re-examined here in detail. The important issue is whether subsequent events have in any way changed the status of Berlin since the decision in *Madsen*.

Briefly, after the defeat of the Axis powers in Europe in 1945, the Supreme Commanders of the various Allied Powers issued a declaration assuming supreme authority with respect to Germany, including "all the powers possessed by the German Government, the High Command and any state, municipal, or local government or authority." 12 Dept. of State Bull. 1051. Whatever authority Germany regained after this assumption of supreme authority depended upon the agreement and consent of the occupying powers.

*The United States has consistently taken the position that the Berlin occupation status cannot be unilaterally changed by any of the four occupying powers, including the Soviet Union. This country committed itself to a specific agreement with the United Kingdom and France that the rights of the occupying powers would continue to be exercised in Berlin notwithstanding the termination of the occupation regime in West Germany. *Tripartite Agreement on the Exercise of Retained Rights in Germany*, T.I.A.S. 3427 (par. 3). For a full statement of the position of the United States on Berlin, see *The Soviet Note on Berlin: An Analysis*, State Dept. Pub. 6757 (1959). This publication explains in detail the history of the status of Berlin after World War II as well as the texts of various replies to Soviet proposals on Berlin. Without exception, this country has bottomed its right to be in Berlin on the continued existence of the occupation. See the *Statement by the Department of State on Legal Aspects of the Berlin Situation, December 20, 1958* (Documents on Germany, 1944-1959, *supra*, p. 336).

The policy of the Government of the United States has been to place Germany on an economically self-sustaining basis and to permit the German people to govern themselves. In implementation of this policy, the Western military governors approved the so-called Bonn Constitution which was to form the Basic Law of the Federal Republic of Germany. One paragraph of the letter of approval submitted by the military governors of the western zones of Germany to Chancellor Adenauer is particularly pertinent to the problem of Berlin. Two Articles of the Basic Law purported to include Berlin as a Land within the Federal Republic. Article 23 provided that the Basic Law applied to Berlin; and Article 144(2) in effect stated that if, because of some restriction the Basic Law could not apply in Berlin, that city could still send representatives to the Bundestag and the Bundesrat. The military governors suspended the effect of these two Articles as they applied to Berlin. *Germany 1947-1949, The Story in Documents*, 279, State Dept. Pub. 3556 (1950) (Letter of May 12, 1949).² This reservation as to the exercise of sovereignty by the Federal Republic of Germany in Berlin has never been repealed or altered in any manner whatever. On the contrary, in 1952, during

²"A third reservation concerns the participation of Greater Berlin in the Federation. We interpret the effect of Articles 23 and 144(2) of the Basic Law as constituting acceptance of our previous request that while Berlin may not be accorded voting membership in the Bundestag or Bundesrat nor be governed by the Federation she may, nevertheless, designate a small number of representatives to attend the meetings of those legislative bodies."

negotiations which culminated in the formulation of the Bonn Conventions,¹⁰ the Allied High Commissioners (who had replaced the Military Governors) in a letter to Chancellor Adenauer reiterated the reservations made earlier by the military governors as to the application of certain portions of the Basic Law of the Federal Republic. T.I.A.S. 3425, p. 1352. And the Bonn Conventions themselves contained specific reservations with respect to the rights of the three powers in Berlin (Article 2, *Convention on Relations*, T.I.A.S. 3425, p. 1484):

In view of the international situation, which has so far prevented the reunification of Germany and the conclusion of a peace settlement, the Three Powers retain the rights and the responsibilities, heretofore exercised or held by them, relating to Berlin and to Germany as a

¹⁰The Bonn Conventions were ultimately adopted with certain amendments by the so-called Paris Protocol and became effective on May 5, 1955. *Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany*, T.I.A.S. 3425. The specific Conventions, as amended (*Convention on Relations between the Three Powers and the Federal Republic of Germany*; *Convention on the Rights and Obligations of Foreign Forces and their Members in the Federal Republic of Germany*; *Finance Convention*; *Convention on the Settlement of Matters Arising out of the War and the Occupation*; *Agreement on the Tax Treatment of the Forces and their Members*) are found in composite form in T.I.A.S. 3425, pp. 1483-1571. As submitted to the United States Senate these Conventions are found in S. Doc. 11, 84th Cong., 1st Sess. The coming into effect of these agreements ended the military occupation of West Germany, and the Federal Republic emerged as an independent sovereign state, subject only to the exercise of the rights of the three powers with respect to Berlin and to Germany as a whole. See above, p. 17 ff.

whole, including the reunification of Germany and a peace settlement.* * * *

When Secretary of State Dulles forwarded the various agreements to the President for submission to the Senate for approval he specifically stated that the arrangements for the termination of the occupation regime in the Federal Republic did not affect the status of Berlin. 31 Dept. of State Bull. 852.

The German Federal Constitutional Court itself asserts that the Federal Republic exercises no direct sovereign powers in West Berlin. In a recent case a Berlin court submitted to the Federal Constitutional Court a question concerning the constitutionality of a West Berlin statute. The Constitutional Court held that it had no jurisdiction to rule on the question, because the reservation of the three powers which prevented the application of the Basic Law in Berlin also prevented the Constitutional Court from taking jurisdiction over questions arising in Berlin.¹¹ The court so held even though the Berlin legislature purported to adopt a statute of the Federal Republic which had conferred jurisdiction on the Constitutional Court. It noted that the Allied Kommandatura in Berlin had protested the adoption of the statute because it violated the policy of the three powers. The court concluded that the reservation precluded its

¹¹ The court did not follow the view of the Allied High Commission that Berlin was not a Land of the Federal Republic. However, it held that the Basic Law of the Federal Republic was effective in Berlin only insofar as it was not restricted by reservations of the three powers.

exercise of jurisdiction in Berlin.¹² 10 *Neue Juristische Wochenschrift* 1273 (No. 35, 1957); 52 *Am. Jour. Int'l Law* 358-360.

The United States has maintained its policy of separate treatment of Berlin throughout the post-war period. Although the three Western powers were hopeful that the policies established for the Federal Republic could be extended to Berlin in order to insure its economic growth, outright inclusion of Berlin within the Federal Republic has not been deemed feasible. West Berlin, its status, and our control, have been unaffected by our agreements with the Federal Republic of Germany.

2. The situation with respect to the local government of Berlin did not develop as did that of the Federal Republic. Although as far as possible the Allied powers placed the local government into the hands of the people of Berlin, the status of the city as an occupied territory remains unchanged. The Allied Kommandatura, the agency which administers and has administered Berlin since its occupation, is the governing body of that city. This body was not dissolved, as was the Allied High Commission with the emergence of the Federal Republic.¹³

¹² Other courts of the Federal Republic whose jurisdiction does not involve the right to pass on Berlin statutes have been permitted to exercise appellate jurisdiction in cases arising in the Berlin courts. *Berlin: Allied Rights and Responsibilities in the Divided City*, 6 *Int'l and Comp. L.Q.* 83, 93.

¹³ The Agreement on the Control Machinery in Germany on November 14, 1944, as amended May 1, 1945, established quadripartite governing authority for the city. The Soviet Union left the Kommandatura in 1948 and since that time the Western sectors of Berlin have been governed by the remain-

The Kommandatura approved a Constitution for Berlin in 1950, but paralleling the reservation previously mentioned (*supra*, pp. 16-18), reservations were expressed with respect to the government of Berlin. Article I, paragraphs 2 and 3 of the Berlin Constitution provided that Berlin was to be a Land of the German Federal Republic, and that the Basic Law and the laws of the German Federal Republic were to be binding on Berlin. In its letter of August 29, 1950, to the Chairman of the City Assembly, the Oberbürgermeister, and the President of the Kammergericht, the Kommandatura suspended these paragraphs of Article I. *Berlin: Development of Its Government and Administration* (Office of the U.S. High Commissioner for Germany, 1952) 231. Thus, as already shown, Berlin did not become integrated within the Federal Republic, and the laws of the Republic did not become applicable to Berlin.¹⁴

In connection with the establishment of local government in Berlin and with specific reference to the judicial power of the Berlin courts, the Kommandatura enacted Law No. 7, reserving certain judicial

ing three powers. *Berlin: Development of Its Government and Administration* (Office of the U.S. High Commissioner for Germany, 1952) 30, 32. Upon the termination of the occupation regime in West Germany, all responsibilities, duties and governmental functions (except military responsibilities which were delegated to the Area Military Commander) were vested by the President in the Chief of the United States Diplomatic Mission to the Federal Republic of Germany. Exec. Order 10608, 20 Fed. Reg. 3093.

¹⁴ Subsequent permission was granted to the people of Berlin to enact, separately, certain legislation previously adopted by the Federal Republic.

powers to the occupation government. Article 1 provides that, except when expressly authorized by the Kommandatura or the appropriate sector commandant, German courts shall not exercise criminal jurisdiction over Allied forces. Official Gazette of the Allied Kommandatura Berlin, No. 2, March 31, 1950. Allied forces were defined to include civilians (as petitioner Wilson), serving with the occupation forces.¹⁵ Kommandatura Law No. 2, Official Gazette of the Allied Kommandatura Berlin, No. 1, February 9, 1950. Under Law No. 7, a sector commandant has authority to suspend the decision of a German court, even in a civil case, if Allied personnel are affected. He also has the power to transfer the cause to an occupation court, which then can confirm, nullify, or modify the proceedings had in the German court.¹⁶ Law No. 7 and the Reservations made by the Kommandatura with respect to the Berlin Constitution are still in effect.

The latest declaration of occupation policy is expressed in a letter sent by the Kommandatura to Berlin officials when the Federal Republic became an

¹⁵ Article 1 (3): "The expression 'Allied Forces' shall include:

* * * * *

"(c) non-German nationals, civilian or military, who are serving with the Occupation Authorities; * * *"

¹⁶ The commandant is not limited in his power to the transfer of cases. He may take any other action to insure immunity of Allied personnel. Occupation courts in Berlin have presently ceased to function. The power to convene them still exists, but the practice now is to refer to a court-martial all criminal cases which might have previously been heard in an occupation court.

independent sovereign state.¹⁷ Paragraph 1 of the declaration provides that Berlin may exercise all rights set forth in its Constitution, subject, however, to the reservations made by the Kommandatura in its letter of August 29, 1959 (*supra*, p. 20). Paragraph 2 provides that the Allied authorities retain the right to take any measures which might be required to fulfill their international obligations, to insure public order, and to maintain the status and security of Berlin. Paragraph 6 provides that all legislation promulgated by Allied authorities shall remain in force until amended or repealed or deprived of effect. However, the Berlin legislature was given the power to amend or repeal such legislation, with the approval of the Allied authorities. Paragraph 7 states that, in the event of any inconsistency of Berlin legislation with Allied legislation, or other measures of the Allied authorities, or the rights of Allied authorities under this declaration, the former would be subject to repeal or annulment by the Kommandatura. In sum, this declaration of principles by the Kommandatura has all the incidents of a military government directive. Although Berlin does in fact have a large measure of a local governmental autonomy, the powers exercised locally exist only by virtue of and with permission of the occupying powers.

This is the position we maintain today with respect to Berlin, not only toward the Federal Republic of Germany but also toward the other nations of the world, such as the Soviet Union. See the *Note from the*

¹⁷ This letter is reprinted in the Appendix, *infra*, pp. 25-29.

United States to the Soviet Union on Berlin, December 31, 1958, supra, p. 14. Berlin is occupied territory to the same extent as was West Germany at the time of the *Madsen* case.

3. Since the position that Berlin is still occupied territory has been and is now being taken by this country in the conduct of its foreign relations, we close by noting the long line of cases which hold that the courts will be most slow to go contrary to a definite position taken in foreign affairs by the executive *vis-à-vis* a foreign country, so as not "to embarrass the executive arm in its conduct of foreign affairs." *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35; *Chicago & S. Air Lines v. Waterman Corp.*, 333 U.S. 103, 111; *United States v. Pink*, 315 U.S. 203.¹²

¹² For a fuller discussion of this principle, see the Brief for the United States in Support of Motion for Judgment on Amended Complaint, *United States v. Louisiana et al.*, No. 11 Original, Oct. Term, 1957, at pp. 127, *et seq.*

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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AUGUST 1959.

APPENDIX

ALLIED KOMMANDATURA BERLIN

BKC/L(55)3

5 May 1955

SUBJECT: Declaration on Berlin

TO: Governing Mayor, Berlin

The President of the House of Representatives

The President of the Kammergericht

1. Enclosed herewith is a copy of a Declaration on Berlin, which replaces the present Statement of Principles Governing the Relationship between the Allied Kommandatura and Berlin, and which comes into effect today.

2. The Statement of Principles Governing the Relationship between the Allied Kommandatura and Greater Berlin, as amended on 7 March 1951 is hereby repealed.

UNITED STATES

Major General

G. HONNEN

FRANCE

Général de Brigade

GEZE

UNITED KINGDOM

Major-General

R. C. COTTRELL-HILL

ALLIED KOMMANDATURA BERLIN
DECLARATION ON BERLIN

Taking into consideration the new relations established between France, the United Kingdom of Great Britain and Northern Ireland, the United States of America, and the Federal Republic of Germany and wishing to grant the Berlin authorities the maximum liberty compatible with the special situation of Berlin, the Allied Kommandatura makes this declaration:

I.

Berlin shall exercise all its rights, powers and responsibilities set forth in its Constitution as adopted in 1950 subject only to the reservations made by the Allied Kommandatura on 29 August 1950 and to the provisions hereinafter.

II.

The Allied authorities retain the right to take, if they deem it necessary, such measures as may be required to fulfil their international obligations, to ensure public order and to maintain the status and security of Berlin and its economy, trade and communications.

III.

The Allied authorities will normally exercise powers only in the following fields:

(a) Security, interests and immunities of the Allied Forces, including their representatives, dependents and non-German employees. German employees of the Allied Forces enjoy immunity from German jurisdiction only in matters arising out of or in the course of per-

formance of duties or services with the Allied Forces.

(b) Disarmament and demilitarization, including related fields of scientific research, civil aviation, and prohibitions and restrictions on industry in relation to the foregoing.

(c) Relations of Berlin with authorities abroad. However, the Allied Kommandatura will permit the Berlin authorities to assure the representation abroad of the interests of Berlin and of its inhabitants by suitable arrangements.

(d) Satisfaction of occupation costs. These costs will be fixed after consultation with the appropriate German authorities and at the lowest level consistent with maintaining the security of Berlin and of the Allied Forces located there.

(e) Authority over the Berlin police to the extent necessary to insure the security of Berlin.

IV.

The Allied Kommandatura will not, subject to Article I and II of this Declaration, raise any objection to the adoption by Berlin under an appropriate procedure authorized by the Allied Kommandatura of the same legislation as that of the Federal Republic, in particular regarding currency, credit and foreign exchange, nationality, passports, emigration and immigration, extradition, the unification of the customs and trade area, trade and navigation agreements, freedom of movement of goods, and foreign trade and payments arrangements.

V.

In the following fields:

(a) restitution, reparations, decartelization, deconcentration, foreign interests in Berlin, claims against Berlin or its inhabitants.

(b) displaced persons and the admission of refugees,

(c) control of the care and treatment in German prisons of persons charged before or sentenced by Allied courts or tribunals; over the carrying out of sentences imposed on them and over questions of amnesty, pardon or release in relation to them,

the Allied authorities will in the future only intervene to an extent consistent with, or if the Berlin authorities act inconsistently with, the principles which form the basis of the new relations between France, the United Kingdom and the United States on the one part and the Federal Republic of Germany on the other, or with Allied legislation in force in Berlin.

VI.

All legislation of the Allied authorities will remain in force until repealed, amended or deprived of effect.

The Allied authorities will repeal, amend or deprive of effect any legislation which they deem no longer appropriate in the light of this Declaration.

Legislation of the Allied authorities may also be repealed or amended by Berlin legislation; but such repeal or amendment shall require the approval of the Allied authorities before coming into force.

VII.

Berlin legislation shall come into force in accordance with the provisions of the Berlin Constitution. In case of inconsistency with Allied legislation, or with other measures of the Allied authorities, or with the rights of the Allied authorities under this Declaration, Berlin legislation will be subject to repeal or annulment by the Allied Kommandatura.

VIII.

In order to enable them to fulfill their obligations under this Declaration, the Allied authorities shall have the right to request and obtain such information and statistics as they deem necessary.

IX.

The Allied Kommandatura will modify the provisions of this Declaration as the situation in Berlin permits.

X.

Upon the effective date of this Declaration the Statement of Principles Governing the Relationship Between the Allied Kommandatura and Greater Berlin of May 14, 1949, as modified, by the First Instrument of Revision, dated March 7, 1951, will be repealed.

5 MAY 1955.